2248

SOME CONSIDERATIONS ON THE LAW OF FORFEITURE FOR HIGH TREASON.

WITH

An APPENDIX concerning Eſtates-tail in Scotland.

By Charles Yorke

Sicut pecunia, dare, militi, vim extremam, ita majeſtatis legibus inteſtinam arcemus.

Gravin. de leg. Rom.

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CLAUSES

Extracted from the

ACTS OF PARLIAMENT,

More particularly referred to in this TREATISE.

Stat. 7 Annæ, cap. 21. intituled, "*An act* "*for improving the union of the two king-*"*doms.*"

WHEREAS nothing can more conduce to improving the union of the two kingdoms, which, by her majesty's great wisdom and goodness, hath been happily effected, than that the laws of both parts of Great Britain should agree as near as may be; especially those laws which relate to high-treason, and the proceedings thereupon, as to the nature of the crime, the method of prosecution and trial, and also

the forfeiture and puniſhment for that offence; which are of the greateſt concern, both to the crown and to the ſubject: to the end therefore that the ſaid union may be more effectually improved, Be it enacted, by the queen's moſt excellent majeſty, by and with the advice and conſent of the lords ſpiritual and temporal, and commons, in this preſent parliament aſſembled, and by authority of the ſame, That, from and after the firſt day of July, in the year of our Lord one thouſand ſeven hundred and nine, ſuch crimes and offences, which are high-treaſon, or miſpriſon of high-treaſon, within England, ſhall be conſtrued, adjudged, and taken to be high-treaſon, and miſpriſon of high-treaſon, within Scotland; and that, from thenceforth, no crimes or offences ſhall be high-treaſon, or miſpriſon of high-treaſon, within Scotland, but thoſe that are high-treaſon, or miſpriſon of high-treaſon, within England.

[Then follow ſeveral clauſes relative to the manner of proſecution and trial; and after them, it is ſaid,]

Be it further enacted, &c. *That, from and after the ſaid firſt day of July, in the ſaid year of*

of our Lord one thouſand ſeven hundred and nine, all perſons convicted of high-treaſon, or miſpriſon of high-treaſon, in Scotland, ſhall be ſubject and liable to the ſame corruption of blood, pains, penalties, and forfeitures, as perſons convicted of high-treaſon, or miſpriſon of high-treaſon, in England.

Provided always, That, where any perſon now is, or ſhall be, before the ſaid firſt day of July, ſeiſed of any meſſuages, lands, ſeigniories, rents, tenements, or hereditaments, in Scotland, that is to ſay, an eſtate-tailzie, affected with irritant and reſolutive, or prohibitive clauſes, and is, or before the ſaid firſt day of July ſhall be, married, if any iſſue of that marriage be living, or there be poſſibility of ſuch iſſue at the time of the high-treaſon committed, that then, in ſuch caſe, the ſaid meſſuages, lands, ſeigniories, rents, tenements, and hereditaments, ſhall not be forfeited upon the attainder of ſuch perſon for high-treaſon, (but during the life of the perſon ſo attainted only), ſo that the iſſue, and heirs in tail of ſuch marriage, ſhall inherit the ſame.

[Then follow other provisions, relating to the method of trial, and the offences to be adjudged, or not adjudged, high-treason in Scotland; and, after them, it is said,]

Provided always, and be it further enacted, by the authority aforesaid, That, after the decease of the person, who pretended to be prince of Wales, during the life of the late king James, and since pretends to be king of Great Britain, and, at the end of the term of three years, after the immediate succession to the crown, upon the demise of her present majesty, shall take effect, as the same is, and stands limited by an act made in the first year of the reign of his late majesty king William the third, intituled, "An act for the further limitation of the crown, and better securing "the rights and liberties of the subject," no attainder for treason shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person or persons, other than the right or title of the offender or offenders, during his, her, or their natural lives only: and that it shall and may be lawful for every person or persons, to whom the right or interest of any lands, tenements, or hereditaments,

ments, after the death of any ſuch offender or offenders, ſhould or might have appertained, if no ſuch attainder had been, to enter into the ſame.

Stat. 17. G. II. *c.* 29. *intituled,* " *An act* " *to make it high-treaſon to hold correſpon-* " *dence with the ſons of the pretender to his* " *majeſty's crown; and for attainting them* " *of high-treaſon, in caſe they ſhall land,* " *or attempt to land, in Great Britain, or* " *any of the dominions thereunto belonging;* " *and for ſuſpending the operation and effect* " *of a clauſe in the act of the ſeventh year* " *of the late queen Anne, for improving* " *the union of the two kingdoms, relating* " *to forfeitures for high-treaſon, until after* " *the deceaſe of the ſons of the ſaid preten-* " *der.*"

Section 3. *And whereas, in and by the ſaid recited act of the reign of her ſaid late majeſty queen Anne, it is provided and enacted, That, after the deceaſe,* &c. [as above] *Be it farther enacted, by the authority aforeſaid, That the ſaid proviſo ſo made, by the laſt-recited clauſe, ſhall not take place, nor have any operation,*

force, or effect whatſoever, until after the de-ceaſe, not only of the ſaid pretender, but alſo of his eldeſt ſon, and all and every other ſon and ſons.

CON-

CONTENTS.

INtroduction, concerning the affection of the people of England towards their ancient conſtitution of government in all its parts; their averſion even to plauſible innovations; yet that it is expedient, in a free country, to explain the grounds of meaſures, ſeemingly ſevere, though taken in ſupport of the ancient conſtitution, and founded on its principles. p. 1—7

State of the queſtion, cleared of circumſtances not belonging to it, which have ſometimes been blended with it; affects no natural rights or civil liberties of the poſterity of attainted perſons; only the civil rights of the attainted. p. 7, 8.

General reflections on the imperfection of human puniſhments applied to this queſtion. p. 8—11.

I.] The queſtion argued, from principles of reaſon, juſtice, and policy, ſeparate from the conſideration of any particular municipal laws.

The fundamental propoſition laid down, That the right of inheriting is the creature of civil ſociety: the conſequence drawn, That ſociety may beſtow that right upon conditions beſt ſuited to its own exigencies. p. 11—13.

The propoſition proved againſt thoſe, who think the right of inheriting derived from nature:

The law of nature defined; its principles laid down, as to the end, acquiſition, and transferring of property:

The operation of theſe in a ſtate of nature; the conſequence drawn, that there could be no right of inheriting antecedent to civil inſtitutions:

Suppoſing

Supposing there were such an antecedent right,

1. Either unnecessary, or ineffectual to the end proposed, the benefit of a man's children:

2. Would charge the greatest absurdities on the laws of all countries. p. 13—21

This right instituted by civil society, upon reasons of general convenience, which have no relation to the children as such; the consequence drawn, that reasons of a like nature may account for the interruption of it: and proved against those, who admit it to be instituted by society, and yet suppose, that the great end of it was the benefit of a man's children, to be attended, on their supposition, with great absurdities in the manner of instituting it;

1. From the extent, to which it is carried in one respect, and the boundary set to it in another:

2. From its being equally ineffectual to the end proposed in a state of society, as of nature; and more unnecessary:

3. From its being made liable to interruption, by the general power of alienation permitted to the father; which ought not to have been, if instituted solely or principally for the benefit of the children. p. 21—28

The same reasoning which holds for the father's power of alienation by sale or gift, concludes for alienation by forfeiture. p. 28, 29.

The forfeiture of honours, though not alienable by him who enjoys them in England, distinguished from that of other property:

Shewn to stand upon its own reasons. p. 29, 30.

The interruption of descent proceeding from the interposition of one attainted between an ancestor or an heir, more remote in degree than him attainted, called corruption of blood, explained to be, in point of reason, a necessary consequence of the law of attainder. p. 30—34

Objection:

Objection from equity and good conſcience, in reſpect of the children, anſwered;

1. By ſhewing, that equity and conſcience do not interfere in this caſe:

2. From the general policy of law. p. 34—39

II.] The queſtion argued, from the municipal laws of many free countries;

—— Of the Jews;

—— Of the Athenians;

—— Of the Romans;

—— From the law of feuds:

This laſt inſiſted upon, as connected with the laws of England. p. 39—50

The great principles of the feudal policy ſtated:

Cleared of adventitious circumſtances, which, in different countries, have corrupted it; and ſhewn to be free:

A policy reſembling it ſubſiſted in England before the conqueſt:

Forfeiture of inheritances for high-treaſon known here, antecedent to the reception of it:

The feudal policy received by free and national conſent:

Made no alteration in this ſanction of the law of treaſon:

Has added new reaſons, peculiar to itſelf, in ſupport of it. p. 50—60

Objection, That in England the policy is a fiction, and the reaſon of it ceaſed with the military tenures, anſwered;

1. From maxims of law, as to fictions;

2. From the preſent ſtate of the Engliſh conſtitution, which is feudal. p. 60—65

This kind of forfeiture ſubſiſts in

Germany,

Switzerland,

The Low Countries. p. 65—67

Objection,

Objection, from the nature of a mixed government:
Anſwered from the ſame topic of argument conſidered more exactly. p. 67, 68.

III.] The queſtion argued, as to the particular eſtates and rights of property, to which the forfeiture extends:
(I.) by the feudal law, examined in four branches:
1. Perſonal things;
2. Eſtates in land;
Craig's opinion, That an eſtate deſcending from a father to an attainted ſon, ought, inſtead of eſcheating to the crown, to go immediately to the father from the collateral, without notice of the attainted, or his heirs, refuted;
(1.) From a general principle of policy in all ſtates;
(2.) From the policy of the common law of England;
(3.) From general convenience.
3. Honours by tenure.
4. Dower. p. 68—76
(II.) By the law of England;
The prerogative of the crown in forfeiture, and the legal notion of it:
This law purſued in every inſtance as the feudal law;
1. Goods and perſonal things.
2. Lands, particularly of the forfeiture of eſtates tail;
Difference between them and eſtates in fee-ſimple, as to the effect of attainders upon them, founded on what reaſon;
Objection from analogy, That the law of impeding deſcents has been altered as to aliens; ſo it may be in treaſon; anſwered from the points of difference between the two caſes:
The regard, which our law has to this part of the law of forfeiture:
Advantage, which it has over the feudal law:
3. Honours by tenure, writ, and patent:
4. Dower; conſidered differently in the law of England and the feudal law. p. 76—87

Objection.

Objection to the impeding of deſcents by corruption of blood, as depending not on natural, but artificial principles, anſwered,

1. From the general principles of the laws of deſcent:

2. From the nature of legal conſtruction:

General abſurdities flowing from the proviſo in ſtat. 7th queen Anne, c. 21. by which the offender can forfeit a real eſtate only for his own life:

Particular abſurdities as to the late act concerning the pretender's ſons, which would have followed upon ſuffering that proviſo to take place at the time of the pretender's death. p. 87—93

IV.] The queſtion argued, as to the manner and circumſtances of exacting this forfeiture; the treaſons, to which it is applied; and the conſequences of aboliſhing it, in point of ſtate policy:

The lenity and wiſdom of our law, as to the infliction of this penalty, ſhewn,

1. From its tenderneſs to the poſterity of offenders, in its care of family ſettlements:

2. From the exact juſtice ſhewn to the offender himſelf;

(1.) As to the deſcription of the crime;

(2.) As to the trial:

3. From the tenderneſs ſhewn to him, by allowing a reſort for pardon in the prerogative of the crown. p. 95—106

Opinions of Lord Hale and Lord Coke, as to the ſeverity of the law of treaſon. p. 106, 107

Objection, That the deſcription of treaſon in England is applied to offences, which may injure the perſon and adminiſtration of the king, without aiming at thoſe, which may be incurred againſt the people by that adminiſtration itſelf.

(1.) Shewn in one light (as it concerns private men, and the miniſters of the king), not to be true in fact;

1. From

1. From the general notions of the law, as to public crimes;

2. From the cases included in the stat. 25 Edw. III.

(II.) Shewn in another light, (as it concerns the king himself), to contradict or mistake the principles, on which the constitution is framed;

1. From the notion, which the law entertains of the king;

2. From the difference between absolute and limited monarchy.

(III.) Shewn to lead into the danger of constructive and arbitrary treasons. p. 107—126

Objection drawn from the temptation given to ministers to abuse the power of exacting this forfeiture, answered,

1. Particularly from the policy of government introduced by the Revolution.

2. Generally, from the extensive absurdities of the objection. p. 126—131

A question asked, Suppose there had been no forfeiture by the ancient constitution; would it have been thought right to institute it now? answered. p. 131, 132

Objection, The terrors arising from it is so great, that resistance to bad governments will become more difficult than the principles of liberty allow:

Answered at large;

1. That the abolition of this forfeiture will be unsafe to good governments; and the continuance of it not deter a justifiable resistance to bad:

2. That the objection proceeds from erroneous notions, both in respect of common experience, and the nature of law:

3. That the abolition will not attain the end proposed by it, the protection of the estates of honest men in civil troubles. p. 132—142

Conclusion applied to the peculiar necessity of these times. p. 142—151

Appendix. p. 151—190

SOME

SOME

CONSIDERATIONS

ON THE

LAW OF FORFEITURE, &c.

THE people of England have ever entertained ſo high a veneration for their form of government, as to ſubmit to it with an acquieſcence equal to that ardour which they have ſhewn in the defence of it. To this felicity of temper and conduct it is owing, that their groundleſs jealouſies ſoon die away, when they find the miniſters of ſtate purſuing ſtrictly the ſpirit and intention of the law of the land; which is acknowledged in every inſtance to be the beſt rule, however oppoſite to tranſient opinions, or momentary wiſhes. The prerogative

tive itſelf, though in the ancient exerciſe of it ſcarce to be diſtinguiſhed from tyranny, yet, circumſcribed by that rule, has been eſteemed of general advantage; and thoſe great men, who aſſerted our liberties, at the beginning of the civil wars, meant nothing more than to reduce it to its juſt bounds, without a thought of offering the leaſt undue violation to it. In reſumptions, which have been ſtrong legiſlative acts to reſcind grants made by the crown, to the diſgrace of him who wore it, a ſaving was always expreſſed to the royal power of granting in the moſt unquiet times. The conduct of the houſe of lords, (a body, whoſe privileges have been the ſource of jealouſy), as to the caſe of the Ayleſbury men in a late reign, when the two houſes of parliament appealed againſt each other to the throne and to the public, gained the applauſe of the people, even againſt that great and deſerved favourite, their own repreſentative; becauſe that houſe acted in ſupport of legal rights, and the ancient juriſdiction of parliament. Theſe inſtances prove, that, well knowing the wiſdom of their anceſtors in modelling the conſtitution with an admirable equality, the peo-

ple

ple were desirous to transmit it down to their posterity, as a thing sacred and unalterable. In this they proceeded on the tendereſt regard to the welfare of the realm, and to a truth too often experienced in our hiſtory, that when old foundations are weakened, or landmarks removed, though with plauſible deſigns to ſecure or extend liberty, the Engliſh ſubject is a loſer by every innovation.

But the heat of honeſt men being once raiſed, and the cooler paſſions of artful men diſſembled by a ſpecious zeal for public good, the calm voice of reaſon and the law finds no attention; and perſons of leſs underſtanding, incited by example, add greatly to the weight of that clamour, which, for a time, has ever been too ſtrong for argument. Nor in theſe laſt is it to be wondered at, ſince enlarged views are requiſite on matters of general concernment, which few are enabled to form either by nature or education, and from which more are called off by the nearer proſpect of a narrow and imaginary ſelf-intereſt. As the worſt evils of ſociety flow from ſhort-ſighted or perverted judgments, the conſtitution, with a policy peculiar to it-

ſelf, encourages every method of popular inſtruction. A freedom of debate in parliament tends to clear and lay open the grounds of public proceedings; and the liberty of the preſs is as naturally fitted to the ſupport of good government, as to the ruin of bad. Meaſures, that carry with them a fallacious appearance of lenity, are expoſed by this means; and thoſe, which carry with them the form of ſeverity, but have the ſubſtance of ſtrength and ſafety, are ſet in their juſt light for the approbation of the people. In the laſt caſe, ſuch inſtruction is a matter of neceſſity; becauſe whatever has the air of ſeverity, is ſeemingly repugnant to the genius of a free government, and ungrateful to generous minds; above all to Engliſhmen, trained in the principles, and celebrated for the exerciſe, of humanity. Beſides, in an age fond of liberty, but impatient of thoſe ſalutary reſtraints of law, which alone make liberty either laſting or valuable, it is natural to ſuppoſe, that ſome would be for throwing down the fences, which may control irregular attempts; and therefore, no wonder if ſuch as mean to repair and keep them in order, ſhould become the object of their cenſure.

ſure. That cenſure ill underſtood, and not properly refuted, might make an impreſſion, and overcome the national affection for the law, if coloured by fair pretences; eſpecially, if receiving ſtrength from the concurrent ſenſe of the patrons of liberty, who have declared againſt the multiplication of penalties; though it be one thing to multiply and extend them, another to maintain thoſe terrors, which have been, in all times, eſteemed the ſafeguard of government. One principal terror of this kind, it is the argument of this book to vindicate; the forfeiture of inheritances for high-treaſon. That is a ſafeguard, with which every well-regulated ſtate, whether built on maxims of monarchy or freedom, has ever been provided; and without which it were liable to perpetual diſorder from the deſperate ſallies of reſentment, or the daring projects of ambition. Here too our own conſtitution preſerves its uſual excellence; and being framed with much wiſdom and equity as to the crime of treaſon, it ſeems difficult to account for the conduct of thoſe, who, in the parliament of the 7th of queen Anne, were for aboliſhing that puniſhment of the crime, which has ſubſiſted for ages paſt,

is interwoven with the firſt principles, and intimately connected with the foundations of our policy. The greateſt men of the time oppoſed it in the houſe of lords; and when the temper of the commons was ſuch, that they would not have paſſed the bill, which was of great moment to Scotland, without the clauſe to aboliſh the forfeiture of real eſtates in caſes of high-treaſon, the lords very artfully propoſed an amendment to ſuſpend its operation, perſuaded that the prudence of ſucceeding parliaments would take occaſion to repeal it. The ſame debate revived in the laſt ſeſſion, and the bill for making it treaſon to correſpond with the pretender's ſons, or any of their agents, has carried that ſuſpenſion to a probably remoter period, by an addition made in the ſame houſe, and approved in the other. Nevertheleſs, even this gentle, and almoſt neceſſary, alteration, to give life and vigour to the law, in a juncture the moſt critical, created a diſſatisfaction in ſome minds, of which it may not be unſeaſonable to examine the grounds. Indeed, it has been repreſented with ſo many conſequences of terror, that it requires a better authority than that of a private writer, to explain the reaſonings,

ſonings, on which it ſtands. In the mean time he hopes it may be allowed him to ſpeak what he thinks the truth; and, with deference to thoſe who have received contrary prejudices, to ſhew, that, in this inſtance, they forget both a becoming reverence of their anceſtors, and care of their poſterity.

In entering upon the argument of the forfeiture of inheritances, it will be ſaid, It is a ſtrange endeavour, to defend that, which is inconſiſtent with the firſt principles of natural juſtice; and therefore, whilſt an objection, that touches the *jugulum cauſæ*, is not removed, arguments from policy, and the concurring practice of nations, come too early; and muſt be conſidered as weak artificial reaſoning, oppoſed to the ſtrong natural dictates of ſenſe.

But why contrary to juſtice? The anſwer is, that "The innocent poſterity ought not "to ſuffer for the guilty anceſtor."

It is not to the purpoſe of this eſſay to attempt a juſtification of any inſtances, in which the laws of forfeiture may, in ſome countries,

countries, have been carried to an extremity, as little to be reconciled with principles of policy, as of clemency or juſtice. Among the Perſians and Macedonians, not only the criminals, convicted of treaſon, were put to death, but all their relations and friends. The deſcendants of Antiphon the orator were diſqualified from advancing themſelves, by their own merit, to eſtates and offices in Athens. The poſterity of Marius's faction were excluded by a law of Sylla from the ſame privilege.

When forfeitures and incapacities of this kind are laid out of the caſe, what is the force of the anſwer, as applied ſingly to the queſtion of eſtates or rights of inheritance, enjoyed by the criminal himſelf, or to be conveyed through him to others? It clearly reſults into this abſurdity; That rights concerning property, manifeſtly derived, not from nature, (as will be ſhewn at large), but from the favour of civil ſociety, may not be conferred upon ſuch terms as ſhall bind the poſſeſſor to that civil duty, which he owes the ſtate conferring thoſe rights; and, for the breach of his duty, be ſubjected to forfeiture.

But

But this is to offer ſtrange violence, both to the conſtitution of ſociety, and the concluſions of reaſon.

If we conſider accurately the nature of human puniſhment, we ſhall find it attended with unavoidable imperfections.

How ſhort is our diſcernment! The ſurface of things and actions is alone expoſed to our view: the inward thoughts, the habitual temper, which form the greater part of moral conduct, are entirely concealed from us. It is for this reaſon, that laws aſſign the ſame name, nature, and penalty, to all offences, which bear a conformity in outward reſemblance, though intrinſically varying from one another by a thouſand circumſtances, known only to the Searcher of hearts.

How much ſhorter is our power! We can eſtimate the offence more exactly than we can proportion the puniſhment. In regard to a man's ſelf, death is the laſt puniſhment, which can be inflicted for the moſt malignant and extenſive crimes. But in regard to others,

others, this power, limited as it is, minutely traced into its conſequences, operates perhaps further than we wiſh; ſince in no caſe can it be confined to the criminal, without reaching beyond him to ſome connected with him by friendſhip, intereſt, conſent, or nature. What is ſtill more, it is not only impoſſible to disjoin theſe connections; but, however that were poſſible, it is even neceſſary to complicate them. Society was founded on this neceſſity; it is likewiſe ſupported, even whilſt it ſuffers, by it; and when they are thus complicated, whatever happens to one, muſt be mutual to all. In the inſtance of a king and his people; a king executes by his ſubjects, and, in quarrels with foreign ſtates, they ſuffer various evils, for the weakneſs or iniquity of his government. In the caſe of a corporation; the ſenſe of the majority, or of a choſen number, ordinarily determines the body. On account of faults committed in their corporate capacity, their markets, gates, fortifications, harbours, are liable to forfeiture; and yet many innocent members may ſuffer in the effect of ſuch forfeiture.

To the firſt of theſe caſes it will be ſaid, " That princes own no ſuperior; and, there- " fore, in conteſts with one another, cannot " be ſeparated, for the purpoſes of juſtice, " from their people." To the ſecond, " That " though the guilty and innocent members " of the corporation are under the ſame ſo- " vereign authority, and might be diſcrimi- " nated; yet the corporate body cannot be " puniſhed for wrong acts, but by the loſs of " thoſe privileges, which extend to all. But " in the caſe of father and children, the diſ- " crimination might eaſily be made, and ju- " ſtice ſatisfied: yet the father commits trea- " ſon, and forfeits that eſtate, which proba- " bly might have deſcended to his children."

It may be anſwered, in the firſt place, That this puniſhment, being a pillar of ſociety, agreeably to the genius of the whole edifice, is erected on the great principle of ſociety itſelf, namely, to make the natural and ſocial affections a control upon irregular and ſelfiſh paſſions. In the next, that nothing is a puniſhment, which does not affect a right, ſtrictly ſo called. To make the innocent

nocent ſuffer for the guilty, and to inflict that on the guilty, which, in its conſequences, may affect the innocent, are very different and unequal conſiderations. "Every thing, "(ſays Puffendorf *), which cauſes a ſorrow "or loſs, is not properly puniſhment. It is "a misfortune to be reduced to poverty by "a crime, which cauſed the magiſtrate to ſet "a large fine upon the father of a family; "but not a puniſhment. How many are "there, who come into the world without "the expectation of a patrimony? How "many, who loſe all they have by war, fire, "or ſhipwreck?"—Now, ſince the children have no right but from the father, if he holds the property till his death, or through him, there is no injury done, when he is juſtly deprived of that wealth, which was acquired under the protection of ſociety, to be tranſmitted to his poſterity in ſtated rules of deſcent by poſitive inſtitution; and of thoſe honours which are the rewards of good conduct, the pledges of future faith. Theſe benefits may be conſidered as the gifts of civil government; but life and liberty are the gifts of nature, and ſhould never be taken away

* L. viii. c. 3. § 30.

becauſe of the parent's offence; nor ſhould a ſubject be made incapable of employments, without ſome crime committed by himſelf. Such ſeverities are unwiſe, as well as unequitable. A difference, therefore, muſt be obſerved between the natural rights and common liberties, which are annexed to the perſon of every ſubject, and the peculiar diſtinctions of ſociety, ſuch as riches and honours. Theſe laſt are merely contingent; and, if hoped for in the courſe of ſucceſſion, depend on the conduct of thoſe anceſtors from whom we would derive them. And it is not to be ſaid, men are puniſhed, when theſe contingent advantages, which themſelves neither acquired nor merited, having, by reaſon of the "civil qualification of their blood," (as a great lawyer* of our own has expreſſed it), been brought into view by the deſert of one anceſtor, are intercepted by the crimes of another.

If it be thought, that what is here ſaid is built on a miſtake, and that "the right of "inheriting is conferred by the law of na"ture, anterior to civil ſociety;" it may ſeem

* Lord Chief Juſtice Hale.

proper to ſhew the contrary, with as much clearneſs and brevity as the matter will admit; the rather, becauſe the greateſt writers on the natural law are extremely perplexed upon it, and have found it difficult to free their reaſoning from ambiguity of words, mutual cavils, and the prejudices ariſing from civil policy. The law of nature is uſed in two ſenſes; either as conſiſting of certain regulations abſolutely neceſſary for ſupporting the purpoſes of nature, and conſtitution of things, previous to all civil compact; or as made up of thoſe concluſions of natural reaſon, which different ſtates or civil ſocieties have generally and uniformly thought fit to eſtabliſh into laws by voluntary conſent. The firſt is the only ſtrict and genuine deſcription of the law of nature; and, taking it in that light, it may be ſaid, that although the right of inheriting be known to the laws of every civilized country, and is founded on the beſt principles of natural reaſon, yet it is not a right of nature, or which can belong to any man in a ſtate of nature. To illuſtrate the propoſition particularly, let theſe things be conſidered: 1. That the end of property is ſubſiſtence, by which end nature has bounded our pretenſions to it, however

however civil ſociety may enlarge them. Hence in a ſtate of nature we cannot aſſume more than we uſe, nor hold it longer than we live, and are capable of uſing it. And in this no alteration ariſes from circumſtances of improvement. It is enough, that the thing improved becomes more advantageous to ourſelves, and that we pay to nature the acknowledgments of induſtry for the liberal profuſion of her gifts. 2. That the manner of acquiring property, in a ſtate of nature, is by occupancy; an act of the body, not of the mind; which laſt, expreſſed in any other way, (until civil laws had marked out for words or writing a ſettled operation), would give a title to property too precarious and diſputable. 3. That in the transferring of property, the conſent expreſſed gives a right to the alienee againſt the alienor; and occupancy confirms that right againſt every one elſe. But in the caſe of deſcent, where is the expreſſion of conſent in the alienor? It will be ſaid, That the affection and relation of the deceaſed will create a preſumption of conſent. This is carrying the matter very far, to ſay, that the law of nature, in a ſtate of nature, transfers property by preſumption, in

like manner as a civil law in a ſtate of ſociety. Where is the occupancy to complete the transfer? That title may accrue to ſome other more diligent than the heir, unleſs we will ſuppoſe nature ſo careful as to keep poſſeſſion for him. In a word, is it not more rational to ſay, that tranſmiſſion by deſcent, or acquiring by inheritance, is that act of poſitive and civil law, which prevents the property of the deceaſed from reverting, as it would do in a ſtate of nature, to the common ſtock? But it may be objected, That this manner of arguing ſets the principles of nature at variance with one another: ſhe expects from every man the nouriſhment of his children, till they are able to ſupport themſelves. If he ſhould die before that period, will ſhe not aſſiſt him to complete his views by transferring his property to them? The anſwer is obvious. Upon the principles here mentioned, nature points out another way. If he foreſees the event of his death probable, he may make * conditional gifts and alienations

* The writers on the law of nature ſpeak of the right of making donations *mortis cauſâ*, (a thing known in the civil law), as a right, which might ſubſiſt in a ſtate of nature. And for a plain reaſon. The right of making a gift

nations to his friends, whilſt he lives, for the ſupport of his unaſſiſted children. If, through chance or inadvertence, he neglect it, the law of benevolence, that fundamental principle, requires ſuch, as are neareſt in blood and affection to the deceaſed, to take upon themſelves this care: nay, lays it, in a ſtate of uncorrupt nature, upon the conſciences of thoſe, under whoſe notice the orphans may fall; ſo that nature has not left this compaſſionate caſe unconſidered, unprovided. Yet, ſuppoſe that property deſcends by the natural law; if the children are grown up, and are poſſeſſed of what is ſufficient for their uſe, before their father's death, they ſtand in no need of this ſucceſſion; and by that principle, which confines property to ſubſiſtence, and a capacity of uſing, they are even barred from accepting it. If they are weak, and unable to maintain themſelves, though the property deſcend, they cannot occupy; that is, acquire it, or complete that transfer of it

gift is a natural right. But if it be made juſt before the death of the giver, in truſt for a particular purpoſe, the execution of that truſt muſt, in a ſtate of nature, depend merely on the faith and honeſty of the truſtee: whereas, in civil ſociety, laws have provided methods of compelling him to perform it.

which the preſumed affection or will of the deceaſed, by the operation of law, tenders to them. How then are the children better provided for in this than in the other way, reaſoning upon the matter as in a ſtate of nature?

We may carry it ſtill further, and ſhew, that if the right of inheriting be not conſidered as a right conferred by ſociety, the greateſt abſurdities muſt be charged upon the civil laws of all countries.

1. If the right of inheriting is a natural right, as ariſing from the principle of affection and relation, not poſitive inſtitution, then it cannot be confined to a man's children, but, in failure of iſſue, muſt extend to all his kindred in their ſeveral degrees. Now that is no law to regulate men, either in a ſtate of nature or ſociety, which does not extend to particular caſes; and nature will not ſuppoſe a right of inheriting, without any rule to go by in the application and conferring of it. That rule can be but one; yet civil laws have purſued a thouſand different ways, contrary to the law of nature, according to this reaſoning. 2. If the right of inheritance came

came in by the law of nature, and might ſubſiſt in a ſtate of nature, we may, for argument ſake, imagine the deſcent carried on through ſeveral generations. In conſequence, preſcription, (either for a certain time, as by the Roman or our ſtatute law, or for time immemorial, as by the common law), muſt give a right; otherwiſe ancient and obſcure pretences of wrongful poſſeſſion might be ſet up, in order to diveſt the preſent owner, and to diſturb the public tranquillity. But then the law of nature would be deſtructive of itſelf: for, is it not contrary to natural principles, that a juſt right ſhould be barred by any length of time, and the accident of not demanding it? Or, omitting that conſideration, can preſcription determine the matter, without civil judicatures, to whom it may be pleaded? Has nature decided of the legal preſumption eſtabliſhed in civil laws ariſing from long continuance; or has it declared how many years ſhall limit or bar a right, any more than in what order inheritances ſhall deſcend? If it has, civil laws would do well to follow its proviſions, inſtead of differing from one another and themſelves. Nor let it be ſaid, that diſputes about prior occupancy

pancy are expoſed equally to the objection of diſturbing the public tranquillity, as diſputes about inheritances; both becauſe thoſe of the firſt kind lying within the ocular obſervation of many, and taking their riſe upon the ſpot to be occupied, muſt be of eaſier and ſimpler determination, depending not at all on legal preſumptions, and artificial reaſoning; and becauſe, without the principle of prior occupancy, there could be no ſuch thing, in a ſtate of nature, as the acquiſition of property. And, therefore, any diſputes which might be ſuppoſed to ariſe from it, are to be conſidered as an inevitable evil, whilſt that ſtate remains. But the right of inheriting is not a manner of acquiring property neceſſary for the ſubſiſtence of mankind, and to ſupport the purpoſes of nature. 3. Civil laws have always diſtinguiſhed between *jura ſanguinis* and *jura hæreditaria*; conſidering the one as inſtituted by nature, the other by civil compact. The Roman law ſays, *hæres eſt nomen juris, filius nomen naturæ*; and caſes might be cited out of it, which were affected by this maxim. In the law of England, the ſame diſtinction is clearly made. If a man attainted be murdered by a ſtranger, the

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ſon ſhall not have the appeal, becauſe it is given to the heir: yet, if he is murdered by the ſon, it has been held by ſome great lawyers, that the crime is petty-treaſon, becauſe the relation of a ſon remains. If a man is attainted, and have a charter of pardon from the king, ſo as to be capable of being returned upon a jury between his ſon and another, the challenge, on account of conſanguinity, continues; notwithſtanding the corruption of blood is not taken away by the pardon. Now, if the right of inheriting be a right of nature, the name of an heir cannot be ſeparated from that of a ſon, but they muſt ſtand and fall together, becauſe *jura ſanguinis nullo jure civili dirimi poſſunt.* But againſt this reaſoning we have the authority of two ſyſtems of civil law, which are noble efforts of human reaſon, and the accumulated wiſdom of many ages.

The right of inheriting being proved of civil inſtitution, it may naturally occur to one, who turns his thoughts upon this ſubject, that "It is an inſtitution contrived on-"ly for the benefit of a man's children;

"and,

" and, therefore, ought not to be obſtruct-
" ed by the demerit of the father."

It will be proper to premiſe the anſwer to this objection with obſerving, that although the right of inheriting be hitherto the expreſſion generally made uſe of in this diſcourſe, and relative to the heir only; yet the argument holds equally true of the right of tranſmitting property, which is relative to the anceſtor. For theſe rights imply and ſuppoſe each other, if the ſame perſon be conſidered both as an heir and an anceſtor; that is, in the two different lights in which he ſtands, with reſpect to thoſe who have gone before him, and thoſe who are to ſucceed him; and therefore the terms may be ſaid to be convertible; the one only referring to him to whom the property deſcends, and the other to him from whom it comes. And now, if, without being thought guilty of refinement, we may reſort to the firſt elements of civil ſociety for the reaſons on which theſe rights are grounded, they ſeem to be two; and neither of them has any relation to the children: one, that when thoſe things in which a man had gained property for his ſubſiſtence ceaſ-

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ed to be his in the courſe of nature, the neareſt relation ſhould inherit and take poſſeſſion, leſt the eagerneſs to contend about ſucceeding to them, might turn the ſtate of civil ſociety into a ſtate of war. And hence the rules of deſcent have been extended in ſo many countries, to take in the remoteſt kindred of the firſt occupant or purchaſer. The other, that, when every individual gave up natural rights, as the protection of ſociety was due to him, for ſubmitting his own revenge to public juſtice, ſo this right of tranſmitting property was conferred upon him as one recompence, for purſuing his private advantage in many reſpects, where nature interferes not, ſubordinately to the good of ſociety; and to make the advantages, ſo acquired, more permanent than in a natural ſtate, by extending the enjoyment to repreſentatives, as it were, beyond the bounds of nature. How juſt therefore is it, that he, who has not only ceaſed to purſue that good, but taken meaſures to deſtroy it, infringing the original contract, ſhould forfeit the protection, and loſe the recompence, he gained by it! And if the courſe of deſcent, though in its effect, and perhaps ſecondary view, beneficial to the children,

children, owe its inſtitution to reaſons which ſolely regard civil ſociety, why may not reaſons of the ſame public and general utility account for the interruption of it?

In ſupport of the notion here advanced, and the uſe made of it, one may obſerve the difficulties which muſt attend any endeavour to explain the grounds of this great inſtitution, upon the other more obvious and common notion, ſtated in the objection. Now it is a conſequence, that if the main cauſe of providing a courſe of deſcent for property was the benefit of the children, the firſt makers of laws concerning it muſt have had a particular attention to them, not merely as the deſcendants and neareſt relations of their father, but as left in the weak ſtate of infancy and orphanage. But then the manner of this proviſion is in no ſort proportioned to the cauſe of it; for in ſome reſpects it does too much, and in others too little: too much, as the right of inheriting becomes the mere favour and gratuity of law, to children who are not in that weak ſtate at the time of the father's death, and therefore not comprehended within the reaſon and foundation of the right: too little;

little; for if their benefit be the principal cauſe of this eſtabliſhment, then the equal partition of the father's property ſhould take place between all the children; and thoſe civil laws, which transfer the whole inheritance by deſcent to the eldeſt, ought to give proportionable ſhares of it to the reſt, in caſe the father has neglected it. But as a farther evidence, that the complete and principal reaſons of this eſtabliſhment muſt not be drawn from this ſubordinate effect and ſecondary purpoſe of it, but from the foundations of ſociety, let it be conſidered, that of itſelf, and unattended by other proviſions in favour of infants, this right of inheriting is equally ineffectual to their ſervice in a ſtate of civil ſociety, as it has been * ſhewn to be in a ſtate of nature: and it is ſomewhat extraordinary in reaſoning, to aſſign that as the final cauſe or main end of any inſtitution, which the inſtitution itſelf is apparently not fitted to attain. It is alſo more unneceſſary, becauſe in a ſtate of nature, antecedent to civil policy, it is impoſſible to ſuppoſe any other means of providing for them, than either ſuch as may ariſe from the exerciſe of rights, which nature has an-

* Page 17, 18.

nexed to themſelves, (of which kind the right of inheriting is ſuppoſed to be), or ſuch as may be contrived by the tender affection of the parent, or the diſintereſted care of the benevolent. In a ſtate of civil ſociety, the means are various: infants are not only of private, but of public concern. And ſurely the invention of thoſe great maſters of policy, the ancient lawgivers of moſt countries, failed them unaccountably in this inſtance, if the great cauſe of eſtabliſhing deſcents was the protection and benefit of infants; ſince the ſame end might have been anſwered far better in other ways, without conferring any rights of inheritance at all, or making any alteration in the natural and original condition of property. The ſupreme power of each ſtate might have taken all children out of the hands of their parents, maintained and educated them in a ſtate of equality under the public care; and then, without expoſing them to the danger of that enervate indolence, or vicious activity, too often known to hereditary wealth, might have drawn them out, according to their age, capacity, and improvements, into the civil or military ſervice, more uſefully and more honourably for themſelves

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and their country. This plan is ſo obvious, as well as grateful to the imagination, that it has been touched upon by many writers, and is beautifully purſued in theory to its utmoſt extent, by the framers of imaginary commonwealths, Plato and Sir Thomas More. But the legiſlators of real ſtates ſaw the abſolute neceſſity of eſtabliſhing inheritances for the general order and welfare of ſociety; and at the ſame time knew the plan juſt mentioned, (at leaſt as to the full execution of it), to be impracticable, without allowing that community of goods, of which viſionary legiſlators are fond; but which neither the paſſions of men, nor the circumſtances of ſociety could bear.

To theſe arguments it may be added, That the courſe of deſcent is alike obſtructed by one ſort of alienation as another; and if the benefit of the children was the only or chief ſource of legal deſcents, it will follow, that there ought to be no ſuch thing as a power of alienating, in any manner, veſted in the father: a conſequence, which it will readily be allowed, ſhould be guarded againſt; both as it would deſtroy the mutual and neceſſary dependence of families, and introduce perpetui-

ties, ſo dangerous to that circulation of property which animates all ſocial induſtry. Hence it is, that a man's poſterity are not only indebted to the laws of that country which gave them birth for a capacity of inheriting, but, by the ſame laws, are commonly left in the power of the father, as to their receiving actual benefit from that capacity. In England, a tenant in fee ſimple may charge, waſte, or ſell his eſtate, and convey it away for ever from his heirs. He may deviſe it by will; and, unleſs in caſes of fraud, the law will not interpoſe to make it void. A tenant in tail is maſter of his eſtate, if he purſues the methods of conveyance proper to it. In theſe inſtances it may ſeem very hard, that any man ſhould diſpoſe of a fortune from his poſterity; and yet the law having put them out of the father's power, as to every grant which they receive from the kindneſs of another, and the honeſt fruits of perſonal merit, it wiſely forbears to break in upon the law of nature, which allows a freedom of alienation; and expects no more from the father, than that he conduct the child, as long as he is able, through the weakneſs of infancy, to a condition of ſupporting himſelf by his own labour

labour and attention. Shall it then be in his breaſt to aliene in the forms of law, as intereſt or humour leads him? And ſhall not his attempts to diſſolve ſociety be equitably conſtrued, for reaſons of public uſefulneſs, a virtual intention of exerting his utmoſt power to alienate thoſe benefits, which might have been derived through his channel from the favour of ſociety? Is it fit or reaſonable, that this privilege of alienating at diſcretion, to the prejudice of his poſterity, ſhould be ſo freely indulged to him, upon a plain principle of natural equity, that every man may diſpoſe of his own property as he pleaſes; and that the ſociety, which has from favour, and poſitive inſtitution, conferred on him a right to tranſmit that property to heirs, ſhould not be allowed to confer ſuch favour upon its own terms, (terms indeed eſſential to its ſafety)? That is, in other words, Is it fit or reaſonable, that ſociety ſhould be denied the benefit of that principle of equity, by which the privilege of alienating, ſo valuable to each individual, is indiſputably framed and ſupported?

But it may be ſaid, "The alienation by "forfeiture is more extenſive than any other

" allowed in the law of England, becauſe it
" is attended with the loſs of honours, which
" cannot otherwiſe be aliened; and the cor-
" ruption of blood ſtops the courſe of regu-
" lar deſcent, as to eſtates, over which the
" criminal could have no power, becauſe he
" never enjoyed them."

As to honours, they have ſo far been alienable amongſt us, in former times, as that a man might, by ſurrender, reſtore them to the crown, that fountain from which they flowed. The law is now differently underſtood in this reſpect. But though they are not alienable, like moſt inheritances, ſince that would be to debaſe and proſtitute them, yet they ſeem peculiarly the proper object of forfeiture; for, being, in a ſtricter ſenſe than other kinds of property, the gift and creation of ſociety, the terms, on which they are given, muſt be entirely ſubject to its power. And is it not natural and politic, that a diſtinction beſtowed only for the praiſe of them who do well, ſhould be forfeitable, on the commiſſion of crimes, for a terror to evil doers?

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As to the corruption of blood, it will be eaſily underſtood, when the meaning and reaſon of it are expreſſed in common language, free from legal terms of art. The propoſition to be explained is no more than this; That if a man is not capable of tranſmitting property acquired by himſelf to an heir, it ſeems a neceſſary conſequence in reaſon, which is the ground of law, that he ſhall not be capable of receiving from an anceſtor, either to enjoy, or to tranſmit. And the propoſition may be made out by a very ſhort deduction. The methods of acquiring property can only be divided under the two general heads of purchaſe *(perquiſitum)*, and deſcent *(hæreditas)*; the one referring to him who takes or acquires property in the firſt inſtance by his own or another man's act; the other, to him who takes or acquires the property of an anceſtor, immediately upon his deceaſe, by act and operation of law. 1. Whoever acquires property by purchaſe, muſt do it in one of theſe ways; by prior occupancy, by emption, or by gift. Theſe are the natural ways of acquiring property, and muſt ſubſiſt in a ſtate of nature, anterior to civil ſociety.

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Here the caſes are infinitely complicated and various, and the rules of evidence will vary, according to the nature and circumſtances of every caſe. And whoever claims, under this title of property, claims in his own perſonal right, without deriving from anceſtors. Therefore the ſon of an attainted perſon is equally favoured in whatever he takes by purchaſe, and in the remedy he purſues for this right, as any other ſubject of the ſtate. 2. Acquiſition by deſcent is not natural, but merely poſitive, (as has been ſhewn), and founded on the policy of civil laws. Here the caſes cannot be complex, becauſe the laws of deſcent in moſt countries are very clear; the rule of evidence is ſingle, and will not admit either of reſtraint, or extenſion, in applying it. This is particularly true in the feudal law. For by that law whoever claims under the title of deſcent as heir, ought ſtrictly to deduce his pedigree through anceſtors from the firſt purchaſer or acquirer. And that is the reaſonable rule of evidence in deſcent. Yet becauſe ſuch evidence may often be difficult, a more favourable rule has been introduced in England, that it ſhould only be neceſſary for a claimant by deſcent to

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prove himſelf heir to the perſon laſt ſeized. This is taken to be ſufficient preſumptive evidence of relation to the firſt purchaſer; the law expects this ſhould be exactly proved, and does not require the evidence to be carried further. The conſequences flowing from hence, in point of reaſon, are undeniable. 1. That when he, who was laſt ſeized of the inheritance, has committed treaſon, and the law has ſaid, that he ſhall no longer enjoy it himſelf, nor tranſmit it to an heir, of courſe no ſuch title can be made by any one who claims as heir within that rule of evidence. 2. If the claimant cannot make title where the offender was ſeized, becauſe the *vinculum* of deſcent is deſtroyed; neither can he make title where the offender was not ſeized, if that offender be an anceſtor, who forms the *vinculum* between the claimant and the anceſtor who was ſeized. What then is the general reaſon of law upon this caſe? The offending anceſtor is by act of law diſabled from inheriting or tranſmitting property to heirs. Shall then the law, which is only to be moved by conſiderations that affect the whole, be moved, in this inſtance, by perſonal compaſſion to his family; and make an effort

effort of itſelf, inconſiſtently with its own ſolemn act, to ſupply that connecting link in the chain of deſcent, which has been ſtruck out of it for the traitor's infamy and the public benefit?

After this, it may be objected, that "The "expectation of inheriting, in which the "children are educated, confers a right on "the principles of conſcience, which ſpeaks "the dictates of the law of nature. It is "ever thought a cruelty, that fathers ſhould "alienate from their children by waſteful "expence, or gifts to ſtrangers. The Ro-"man law for this reaſon provided *querela* "*teſtamenti inofficioſi;* and ſome local cuſtoms "in England gave the writ *de rationabili par-*"*te bonorum.* Why then ſhould ſociety make "theſe alienations the conſequence of an act, "which has no immediate reference to ali-"enating; eſpecially when it is the buſineſs "of laws to prevent the ill conſequences na-"turally ariſing from men's actions, inſtead "of adding to them by implication and con-"ſtruction?" The objection ſeems founded on good reaſon, and yet muſt give way to better. If we conſider the kind of expecta-

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tion here ſpoken of, it will be found to ariſe only from the ordinary courſe of families and legal deſcents, and not given in ſuch a manner, and with ſuch circumſtances, as to confer a right, on any principles of law or conſcience. Whether therefore we take the right of inheriting as conferred by civil ſociety, or, for argument ſake, by nature, the expectation ariſing from it is the ſame; ſince it muſt be conſidered, in the firſt caſe, as beſtowed originally on condition; in the ſecond, as qualified by civil inſtitution, like many other rights of nature. And if thoſe who form the expectation will regard that as abſolute, which depends on the performance of expreſs conditions, the inattention muſt be imputed to themſelves, and not to the law of their country. To waſte a fortune which would have made an honourable ſupport for a man's family, is deſervedly eſteemed cruel and againſt conſcience. Why is it not prevented by the care of legiſlators? Becauſe no complete proviſion could be made againſt that evil, which would not be attended with more general inconvenience; and the compliance with the contrary duty is derived from the manners, and the heart, grounded upon principles,

ciples, and enforced by ſanctions, of an higher order than belong to civil laws. If the greateſt good of every community be the object of laws contrived for it, as unqueſtionably it ought to be, every leſſer intereſt muſt yield; it being only the property of divine government to reconcile all private with public good in the final reſult of its diſpenſations. Hence it is, that though laws prevent conſequences injurious to particulars, where they can, conſiſtently with ſocial good, yet in matters which concern the exiſtence of the ſociety or government, conſequences injurious to particulars muſt not only be ſuffered to take place, but even ſought for and indulged, if they have a tendency to prevent conſequences injurious to government itſelf. On this reaſon ſtand thoſe ſevere laws, which have been made in ſeveral ſtates againſt neutrality in times of common danger. It is agreeable to the policy and original compact of government to blend and involve the intereſt of every member with its own; on which account the fortunes of private men in all countries muſt depend upon public revolutions. Were it, in any reſpect, the aim of civil laws to make particular independent of the ſocial good,

good, as it would be a very ſingular ſtrain of policy, ſo it would proceed upon a principle more contrary to the law of nature, than thoſe, who are fond of that law, would deſire to ſee charged upon their doctrine. Beſides, nothing is more natural, on the principles laid down in this eſſay, than the conſtruction which civil laws have put on treaſons againſt government, that when a man endeavours the diſſolution of it, he means to diſclaim all thoſe benefits and rights, which it has either made him capable to enjoy, or the inſtrument to convey: nothing is more neceſſary than to try whether thoſe attachments, which are connected with our paſſions and affections, will prevail, when thoſe, which are founded only in reaſon and convenience, have no power. *Sic legibus comparatum eſt*, (ſays Tully), *ut filiorum caritas amiciores reddat parentes reipublicæ.* Thus ſociety, by making the loſs of thoſe rights it confers upon every man, a penalty for the greateſt crime which can be committed againſt his country, intereſts every relation and dependant in keeping him firm to the general tranquillity and welfare; at the ſame time, it gives him an occaſion of reflecting, that, when he at-

tempts it, he muſt break through every private as well as public tye; which enhances his crime, whilſt it is an aggravation of his puniſhment. Nay more, he may hope to eſcape from the juſtice of his country with his own life, if that alone were to be forfeited; but the diſtreſs of his family will purſue him in his ſecureſt thoughts, and abate the ardor of reſolution. Many inſtances occur in hiſtory, and daily experience, of men, not aſhamed to commit baſe and ſelfiſh enormities, who have retained a tenderneſs for their poſterity by the ſtrong and generous inſtinct of nature. The ſtory of Licinius Macer, who was father to Calvus the great orator, is very remarkable, as related by a Roman annaliſt. Having gone through the office of prætor, and governed a province, he was accuſed, upon returning home, of extortion, and abuſes of his power. The very morning of his trial he ſtrangled himſelf, after having ſent word to Cicero, who was preparing to plead againſt him, that, being determined to put an end to his life before ſentence, (though the penalty did not extend to taking it away), the proſecution could not go on, and his fortune

tune would be ſaved to the benefit of his ſon.

Upon the whole then, Where is the wrong? It is agreeable to juſtice to beſtow rights upon condition. It is the wiſdom of governments to lay hold on human partialities.

But it is not enough to reſt upon arguments from reaſon, to prove there is nothing in forfeitures of this kind inconſiſtent with juſtice: it muſt likewiſe be proved, that they are agreeable to the practice and genius of the freeſt ſtates. This is doubtleſs a matter of much importance, and likely to have the greateſt weight with thoſe, who are more ready to ſuſpect a fallacy in ſtrong reaſons, than great authorities. It may be neceſſary to be large in ſhewing it, becauſe it has been relied on to a contrary purpoſe.

In the Jewiſh republic there are inſtances, in which children were deſtroyed, by the interpoſition of providence, for the crimes, and to increaſe the ſufferings, of their fathers. This by no means furniſhes an infe-

rence to the nature of human puniſhments, being inflicted by the hand of God, with an expreſs prohibition to the civil magiſtrate to imitate it, and founded on the particular conſtitution of their theocracy. But the forfeiture of inheritable eſtates ſtands upon other reaſons, and was conſequent on a judgment pronounced and executed by the ordinary magiſtrate. The taking away of lands from Mephiboſheth by David, and the confiſcation of Naboth's vineyard by Ahab, are examples of it; and though both ſuffered unjuſtly, yet, had their trial been conducted with openneſs and impartiality, there had been no danger from the miſtaken jealouſy of the king, or the oppreſſion of the tyrant. In the time of Ezra, after the extraordinary providence was, in a great meaſure, departed from the Jews, there is an evidence of it in that public act of the ſtate, by which all, who had married foreign wives, were to make their appearance before the elders in three days, under pain of forfeiting their whole ſubſtance.

By the conſtitution of Athens there were three ſorts of *infamous* *, which was a term

* Petit. leg. Att. 503.

of

of art in their law. 1. Thoſe, who aimed to introduce tyranny, as in the caſe of ſuch as aided Piſiſtratus. 2. Thoſe, who owed money to the public, and neglected or refuſed to pay it. 3. Thoſe who had received bribes, behaved ill in ſea or land fights, thrown away their ſhields in battle; all ſuch were baniſhed, and deprived of every immunity, both they, and their poſterity. It is true, judgment of forfeiture was only inflicted diſcretionarily in the firſt and third kind of theſe infamies, but followed in judgment of law as to the ſecond. Plutarch tells us, that Themiſtocles, for concealing the treaſonable correſpondence of Pauſanias with the king of Perſia, forfeited his whole eſtate, to the value of eighty or one hundred talents, to the Athenian treaſury; and his children took refuge in Perſia. Thus, if before ſentence pronounced, eſpecially in the caſe of murder, a man fled from juſtice into perpetual exile, the conſequence was, a forfeiture and ſale of his ſubſtance, by the proper officers, for the uſe of the public coffers. It was another law with them, that any magiſtrate corrupting others to adviſe, or himſelf adviſing, the people to abrogate the laws criminal, ſhould

forfeit his ſubſtance, himſelf and his poſterity be outlawed, and ſubject to be deſtroyed with impunity. They looked upon theſe to be the pillars of the commonwealth, and that it was the magiſtrates peculiar duty to uphold them. Demoſthenes * accuſed a man before the people, who had propoſed a vote, by which fines and forfeitures were, in effect, to be taken away. He ſpeaks of the guard, which had been ſet on that part of the conſtitution by the care of their legiſlators; and aſſigns a very artful and flattering reaſon to the Athenians for a law, which made it forfeiture to propoſe the reſtitution of perſons in particular circumſtances of guilt; That "the legiſlator, knowing the natural lenity "and compaſſion of his countrymen, would "not expoſe the public ſafety to the pretences or abuſe of it."

By the Roman law, the *crimen læſæ majeſtatis* † comprehended many branches, of which the *crimen perduellionis* was, in all reſpects, the moſt ſeverely diſtinguiſhed, and at firſt the only capital. It was ſo from the

* Dem. adv. Timocrat.

† Manut. de leg. Rom. par. 1557.

earlieſt

earlieſt times of the republic, and is marked out as ſuch by the laws of the twelve tables; which is not only an evidence of the practice in Rome, but of the regard had to it in Greece, from whoſe commonwealths, particularly Athens, thoſe laws were borrowed. By capital, amongſt the Romans, was meant, not only the puniſhment of death, but the *minutio capitis*, which, in the largeſt ſenſe, included the loſs of all capacities, and a forfeiture * of a man's ſubſtance to the treaſury; becauſe, as the digeſt phraſes it, *qui civitatem amiſit, hæredem habere non poteſt;* "he who "has loſt the rights of a citizen, can have "no heir;" it being conſidered by the Roman law as a privilege conferred by ſociety

* Biſhop Burnet, in the ſecond volume of his hiſtory, p. 522. where he ſays, that forfeiture was never the practice of free governments, lays it down, That "it was an "invention under the tyranny of the emperors, who "had a particular revenue called the Fiſc, from whence "it was called Confiſcation." To this one may oppoſe the words of Cujacius,—*Fiſcus erat populi, nunc imperatoris. Cujac. ad L. Jul. Maj.* Which paſſage intimates, that forfeiture was a known puniſhment during the republic. It was then called *bonorum publicatio.* But the biſhop ſeems to have been miſled by the late origin of the word *confiſcation*, to imagine the thing itſelf was introduced no earlier.

to

to tranſmit property by deſcent. This crime of treaſon was puniſhed both by death and forfeiture. The caſe of Sp. Mælius, in Livy, is expreſsly to this purpoſe: he is ſaid to have been put to death for aiming to deſtroy the republic, and his goods and eſtate ſold, which he had applied to the moſt unworthy uſe. When the ſentence of forfeiture paſſed upon any man, without depriving him of life, it was given in the form of interdicting from fire and water. Cicero's eſtates were confiſcated by that form propoſed to the people after his falſe ſtep of withdrawing from Rome, and not by any expreſs words in it, but by the legal operation. Antony, Dolabella, Lepidus, were adjudged enemies to the commonwealth, and their eſtates confiſcated. Even Cæſar, who was for mitigating the penalties on the Catilinarian conſpirators, moved a confiſcation of all their property to the public coffers. This particular kind of *læſa majeſtas* was held in ſuch horror, that encouragement was given to accuſers. By law, the informer had his pardon, if an accomplice; nay, if his accuſation was againſt a magiſtrate in office, provided he were capable, his reward was that magiſtracy; if the accuſed was

was only a magiſtrate elect, he was allowed a ſeat in the ſenate, and to give his opinion in the rank of that magiſtrate. The accuſed was immediately diſabled from paying, ſelling, alienating; and no dignity was exempted from the ſevereſt methods of examination. What is ſtill more, this was the only charge, which purſued a man's memory and poſterity; for in caſe he died while the proſecution was depending, his heirs were obliged to defend it: otherwiſe confiſcation enſued, as if the crime were admitted or confeſſed.

Thus it ſtood in matters of treaſon through the beſt ages of the commonwealth. The Cornelian and the Julian laws were the firſt, which made ſeveral other ſpecies of *læſa majeſtas* capital, as well as *perduellio*. As to public crimes not within that deſcription, theſe laws ſeem chiefly deſigned to confirm, or perhaps enlarge, the ſanction of thoſe, which had been growing up gradually, to guard againſt offences, as corruption increaſed. Public and private force, the one with arms, the other without, were puniſhed with the utmoſt ſeverity: the firſt by perpetual baniſhment to ſome certain place, *(deportatio)*, which

which was accompanied with loſs of all rights and capacities, and forfeiture of eſtate; the other with a confiſcation of one third.

By the Cornelian law, the murder of a father or patron was capital; and by the Julian, the murder of any citizen was puniſhed with entire confiſcation and baniſhment.

The crime of peculate, or embezzlement, by the ſame law, was puniſhed in like manner. Papinian ſays, a proceeding was allowed for this crime againſt a man's heirs. And long before the making of that law, in the inſtance of Scipio Aſiaticus, brother to Africanus, a fine ſo heavy was ſet upon him, being charged with having concealed part of the rich booty brought home from Aſia, that his eſtate would not ſuffice to pay it: and, in ſuch crimes, they were often ſentenced to refund four times the value.

The laws, which concerned abuſes in the government of the provinces, were equally ſtrong: ſo were thoſe concerning bribery in elections and judicature; concerning deceit,

(which

(which branched out into many particulars), and clandeſtine meetings.

This is a ſhort ſtate of the laws, which had the penalty of forfeiture during the republic. Auguſtus introduced little or no alteration. In the ſingle caſe of Caſſius Severus, being much galled by the licentiouſneſs of his writings and converſation, he cauſed the matter of libels to be treated capitally, as a crime of *læſa majeſtas*. For the reſt, the mildneſs of his nature inclined him, and the liberty of Rome, ſo lately loſt, made it his intereſt, not to deviate in things of this high importance from the conſtitution of his country. At the ſame time, he ſaw his own ſecurity, and the tranquillity of the ſtate, depended on the exacteſt ſupport of his authority, and the execution of theſe laws. Tacitus *, in deſcribing the progreſs of the laws of majeſty, and the undue extenſion of them in the reign of Tiberius, expreſſes himſelf in this manner: *Nomen apud veteres idem, ſed alia in judicium veniebant: ſi quis proditione exercitum, aut plebem ſeditionibus, denique malè geſtâ rep. majeſtatem populi Romani minuiſſet.*

* L. 1. Ann. c. 71, 72.

nuiſſet. Facta arguebantur, dicta impunè erant. The great point, on which he inſiſts, is, the difference between the crimes, of which men were accuſed under the commonwealth, and under the tyrants, who oppreſſed it. An unguarded ſaying was treaſon againſt emperors; but in the free ſtate, a man could only be accuſed of actions, which had a direct tendency to overturn government. And it is to be obſerved of this hiſtorian, who writes in the ſpirit of liberty, and cenſures with great ſtrength and weight, that he never excepts to the puniſhment of forfeiture, as either a new inſtitution of thoſe times, or unjuſt and impolitic in its own nature. The ſucceeding princes framed ſeveral laws, which carried theſe offences to an height of unjuſtifiable ſeverity. Arcadius and Honorius enacted one, which has been branded by the civilian, as eminent above all for its cruelty: the moſt remarkable terms of it were, "That the intention of conſpiring "ſhould be puniſhed without any overt-act; "that they who preſumed to intercede for "thoſe accuſed of treaſon, ſhould be diſ-"graced; that not only the eſtates of the cri-"minals

" minals ſhould be confiſcated, but their ſons " rendered incapable of inheriting from the " mother, or any relations, or even of ta- " king by the will of a ſtranger; that they " ſhould be perpetually infamous, and diſ- " qualified from aſpiring to honours and dig- " nities, or claiming the ſame privileges of " legal credit with other men in judicial con- " teſts; that, in a word, the very holding of " their lives was to be taken for a mark of " imperatorial mercy; and yet, it is ſaid, " their condition ſhall be ſuch, as to make " life a puniſhment, and death a comfort."

Some of the later emperors by law mitigated theſe, and even the ancient and more juſt ſeverities; but we neither find ſuch ſeverities, nor mitigations, whilſt the republic exiſted. This is eaſy to be accounted for. Different emperors, according to their tempers of mind, or maxims of adminiſtration, might hope to render the arbitrary power, by which they governed, ſecure or agreeable, by influencing the fears, or engaging the affections, of their people; by ſetting forth terrors to reſiſtance, or pretences of lenity to ſubmiſſion. But the great men of the republic, conſidering the

exigencies of government, and knowing, that the freedom and excellence of their conſtitution deſerved all reverence from thoſe who lived under it, and inviolable protection from thoſe who regulated and adminiſtered it, diſdained to act otherwiſe than upon one model, according to the rules of juſtice and true prudence; not the dictates of cruelty or falſe clemency.

We have ſeen, that the forfeiture of eſtates of inheritance for a man's heirs, as well as himſelf, is not inconſiſtent with juſtice. Strong preſumptive arguments have been drawn from the condition of human nature, the law of the Jews, Athenians and Romans, to ſhew it agreeable to policy; which will receive great ſtrength from a view of the feudal law, eſpecially when deduced from its ſource, and applied to the Engliſh conſtitution.

The policy of feuds has in it thoſe principles, which ought to prevail in the foundation of all policies, mutual defence and freedom. It was contrived by the people, who ſprung from that great ſeminary of nations, the North, as an aſſociation to extend, preſerve,

ſerve, and enjoy conqueſts. The general, or prince, claiming to himſelf the ſovereign property, parcelled out the lands to his commanders, who again made ſmaller diviſions to others, under a condition of ſtipulated military ſervices, and of expreſs fealty, to be true to the lord; but that lower fealty, to be governed by their regard to a more comprehenſive, which centered in the prince, and in a ſupport of the great ends of the conſtitution. The potentates of the more weſtern parts, diſturbed by the ſucceſſes of ſo formidable a confederacy, reſolved to turn this policy againſt the inventors, and to diſpoſe of themſelves, and their country, in the ſame manner. In matters of mutual importance, aid was to be mutual; and, in conſequence of the fealty, which enjoined it, the feud or parcel of land, enjoyed by the ſtipendiary, was taken to be a ſecurity for the exact performance of his engagements. Now it followed from the military relation thus begun, that the lord muſt have great intereſt in the vaſſal's qualifications. Hence the feud could not be aliened either in whole, or in part, without his conſent: it might not be ſold, exchanged, mortgaged, incumbered, or de-

viſed. On the other hand, the lord could not diſpoſe of the ſeigniory without the vaſſal's conſent; for it is certain, that the vaſſal would, in his turn, be much concerned in the wiſdom and temper of his maſter. In both caſes, the freedom and neceſſity of this policy required a moſt faithful obſervance of the ſeveral parts of this relation. If the vaſſal failed in his ſervices, or in performing his fealty, or endeavoured to diſunite the bands of duty and connection, by waſting or transferring the feud, or, in general, did any thing to injure the lord's honour, perſon, or eſtate, it was forfeited and reſumable. If the lord proved guilty of injuſtice or oppreſſion, his ſeigniory was forfeited by the ſame law, and the tenant was to transfer his fealty to the lord next above him, or to the prince, as the ſupreme guardian. Theſe obligations were expected from all, who had any part aſſigned them, though it were by the tenure of the plough or huſbandry, in promoting the common welfare.

Such are the principles and the engagements of this policy, which not only run through all that intricate variety of feuds, in countries

tries where it is preſerved pureſt, but even where it received a large tincture from the particular cuſtoms of nations, which adopted it. It is not material to inquire, whether the policy was received in England before or after the conqueſt. The diſputes between the learned are endleſs. Something of the ſame kind is admitted to have been maintained amongſt us very early, even by the warmeſt advocates for the Norman original of it in England. Sir H. Spelman *, in his treatiſe of tenures, allows, that an oath was taken, not of fealty indeed, but to defend the lord of the territory, and for lands, as it were, held in ſocage, but not by knights ſervice. It is true likewiſe, that there was no feudal eſcheat; yet a memorable law of Canute, (who cauſed the Saxon laws to be obſerved ſtrictly, afterwards called Edward the Confeſſor's), expreſſes a puniſhment reſembling it: *Qui fugiet a domino ſuo vel ſocio pro timiditate in expeditione navali vel terreſtri, perdat omne quod ſuum eſt, et ſuam ipſius vitam; et manus mittat dominus ad terram, quam ei dederat; et ſi terram hæreditariam habeat, ipſa*

* C. 21.—23.

in manum regis tranſeat. In this caſe the lands holden of any lord are to revert to him; and the hereditary land, or Saxon bocland, which, according to the antiquaries, was free from ſervice or tenure, is directed to go to the king, as a regal forfeiture. Conſequently, this penalty of forfeiting inheritances ſubſiſted in England before the period commonly called the Conqueſt; reſembles the feudal policy, though varying in ſome circumſtances; and, clear of feudal notions, may be juſtified from ancient uſage, upon the general principles, and for the ſecurity of government.

Let it now be taken for granted, that although the kingdom had traces of fealty and forfeiture, that is, of a feudal policy, from the earlieſt times, yet that the law of feuds, ſtrictly underſtood, was not received till after the conqueſt; and we ſhall not find the queſtion affected by it, otherwiſe than as it throws new light upon the argument, and affords additional reaſons peculiar to itſelf in ſupport of it. The two inquiries to be made are, Whether the law of feuds was received with any circumſtances of ſlaviſh ſubmiſſion; and

and what alterations arose from it in the state of forfeitures.

The first of these inquiries may be resolved by observing, that the policy was not imposed, but came in by free and national consent, at a parliamentary meeting in the eighteenth year of the reign of William the first. The law, enacting the reception of this policy, is observed, by a learned and judicious writer *, to be penned, as if the king were merely passive, the more clearly to express the consent of the *commune concilium* to so considerable an alteration; for the rest of the conqueror's laws are worded in another manner, and seem to mention the *commune concilium* only in reference to that law. But, by several of these, the king engages, in favour of the tenants, to make no unjust tallages or exactions, and to demand no other than such services as are purely feudal, and for the benefit of the kingdom. Thus the policy of tenures, as adopted in England, has nothing precarious or illiberal. Even the villeins, who were bondmen to the Saxons, by being admitted to homage and fealty, re-

* Wright of tenures, p. 66.

ceived

ceived infranchiſement, obtained freedom of their perſons, and an uſe of occupying their lands; and by ſucceſſive ſtatutes were advanced to ſome account in the ſtate.

As to the ſecond inquiry, concerning the alterations introduced into the ſtate of forfeitures by the reception of the ſtrict feudal policy, it is remarkable, that in the caſe of high-treaſon no innovation was made. Indeed the eſcheats of hereditary lands for petty-treaſon, and felony, aroſe from that policy; ſo that where tenants held immediately of the king, any devolutions for theſe crimes were properly eſcheats; but, upon commiſſion of high-treaſon, the lands and tenements, which came to him, were not eſcheats, but forfeitures given to him by the common law, derived from the Saxon times, not depending upon feuds, and exactly agreeable to the law of Canute already cited. Theſe, of whatever kind, fell into his hands, without any regard to the ſeigniory of meſne lords. The original feudal law * ſuppoſes no eſcheat or forfeiture, but to the immediate lord, even in crimes, which concern the

* P. 117.

prince

prince or proprietary. In the law of England it is otherwiſe; and if we ſhould aſſign a feudal reaſon for it, as well as reaſons drawn from general policy, it ſeems probable, that lords, being, in many reſpects, anſwerable for the tenants miſbehaviour, were conſidered as having failed in their duty to the crown, (from whom the lands both of the lord and tenant were ſuppoſed to be derived), by making choice of an ill-inclined feudatary; and were induced, by this penalty, to obſerve a more than ordinary care, in the election of perſons to ſo great a truſt. The ſame reaſon had weight in caſes of felony, where the land ſhould return to the lord, and he might remit the crime or eſcheat; yet becauſe a neglect is ſuppoſed, on his part, in the appointment of a tenant, the land, and a power to waſte it, ſhall belong to the king a year and a day, in prejudice of the lord. Among the Saxons, there was no eſcheat of inheritable lands in felony; and Sir H. Spelman † thinks the Kentiſh Gavelkind maxim, of the father to the bough, and the ſon to the plough, was univerſal throughout the kingdom. But in matters of treaſon,

† C. 23.

which

which ſtrike at the foundation of policy and government, even Gavelkind lands are forfeitable, and always were; which is derived from thoſe ancient lawgivers, as well as the privilege in felony.

It has been ſhewn, from the nature of the feudal policy, that the great principle of the law of England, that all lands bear a reference to the king, as having the *ſupremum dominium*, is founded on the greateſt wiſdom, and a true regard to the common ſafety. On this account it is ſaid, by the feudal writers, that fealty could not be diſpenſed with; and though ſworn only to the lord, yet its virtue and effects operated to the benefit of the whole. Hence the obſervance of it was a main article of inquiry in the lord's court. For the ſame reaſon, theſe writers lay it down, that the direct dominion cannot be alienated from the politic capacity of the king; that fee has its name from fealty; that no covenant can be made againſt performing it; that though the oath be ſpared, yet the duty is virtually implied in the acceptance of the fee or feud; and that the failure in this fealty is the loſs of the land. It has been already

already ſuggeſted too, that a government thus depending on fealty, and the neglect of it attended with ſuch a puniſhment, was the earlieſt conſtitution of England; and the good effects ariſing from it might induce our anceſtors, with more readineſs, to embrace a policy, which promiſed to convey the ſame happy effects with greater certainty, as it ſeemed to have this advantage over the ancient form, that it cemented all orders of men more cloſely, and enforced their connection more minutely: they were, however, not aware, that it would ſoon be made a pretence for the introduction of thoſe burdenſome ſervices, which occaſioned all the uneaſineſſes of ſucceeding reigns. Sir H. Spelman *, in one place, expreſsly ſays, it is not his opinion, that the conqueror introduced feuds or military ſervices in a general or leſs ſtrict ſenſe, but the law of tenures in its full extent, and thoſe ſervices, which were the grievances. The nation ſoon felt the weight, and threw it off in the reign of his ſon Henry the firſt, who, in his charter, mitigating wardſhip, marriage, and relief, took

* Tr. of ten. c. 28.

away

away the evil cuſtoms, which had been engrafted upon tenures, and reduced the policy to its pure ſtate, and original intention. They revived again by degrees, and were, at different times, limited and reſtrained by our kings, being in themſelves not at all eſſential to this form of government, but deſtructive of it, in giving it the air of ſlavery, when it was founded on principles of liberty, and breaking the ſpirit of the people by oppreſſion. The ſtat. 12 Car. II. c. 24. has ſince aboliſhed even the military ſervices; and the feud or fee is much varied from its firſt inſtitution in the courſe of time and law. It may then be objected, That the principle of the law of England, "which ſuppoſes all lands "derived mediately or immediately from the "crown, is no more than a fiction; and the "military ſervices being aboliſhed, and the "crown-lands diſperſed amongſt the people, "the reaſon of it ceaſes."

1. As to its being a fiction, it is very true, the right of the people of England to their property does not depend upon, nor was in fact derived from, any royal grant. The reception of the feudal policy, in this nation, exactly

exactly anſwers the definition of a fiction *, which is ſome ſuppoſition in law, for a good reaſon, againſt the real truth of a fact, in a matter poſſible to have been actually performed, according to that ſuppoſition. This being admitted, What follows? It will be urged, "That fictions of law are to convey "benefit, not injury, to the party uſing or "adopting them; and that this is a prepo-"ſterous fiction, which tends to the ruin of "families, by putting their eſtates, for the "fault of one anceſtor, into the power of "the crown." It has been ſhewn, that the forfeiture of lands for treaſon was known in England before the introduction of this policy, (what ever might be the caſe in reſpect of other crimes); and, even after, was never modelled upon the rules of it. But not to decline arguing the matter upon ſtrict feudal notions, it will be neceſſary to try this fiction, as it concerns inheritances, by maxims, which are in law the boundary of ſuch fictions. Does it prejudice the right of ſtrangers? That cannot be ſaid. Such right is ſaved, both by the intention of the common

* Calv. lex. jurid.

law, and the expreſs words of ſtatutes. And as to the intereſt of the heir, it is derived from that of the anceſtor, and intimately connected with it. Is this fiction ſtrained to a collateral purpoſe, which does not naturally flow from it? Neither can that be ſaid. For it is the very point and conſequence of the fiction, that, when the tenant hath broke through his engagements, the land ſhould return to him, of whom it is originally holden. In every law, which has the public advantage for its object, it may happen, that private intereſts ſhall interfere and ſuffer. Yet, if it be a ſuffering, becauſe of a juſt and neceſſary ſanction, it muſt not be conſidered as an injury; the end of that ſanction being to heal the pravity, and deter from the imitation, of bad conduct. And thus the feudal policy, a fiction, bringing forfeiture along with it, may be conſidered as conveying benefit to the nation, and thoſe who adopted it.

2. It is a maxim in law, That fictions are not to be maintained beyond the reaſon which gave riſe to them. And it may be ſaid, "That the abolition of tenures by knights "ſervice,

"ſervice, and the fruits of them, has de-"ſtroyed the reaſon of this principle." But has not the ſtat. 12 Car. II. declared all the ground of England to be held in common ſocage? And is not fealty due for ſocage lands? And is it not agreeable to the ends and welfare of government, that it ſhould be due? What were the aids formerly granted and aſſeſſed in parliament, for the ſupport of the king's wars? Or, What is the land-tax, now annually raiſed for the current ſervice, but of feudal original? A kind of general eſcuage, or commutation of ſervice, according to the proviſions of Magna Charta? Is then the policy, or the reaſon of it, ceaſed? What is this but a regard to the defence, ſecurity, and honour, of the realm? It was thought in the feudal law, that a man, who had once violated the ſacred relation he engaged in for the public benefit, ought to be excluded from it. Does the reaſon ſubſiſt no longer? The ſtrength of the kingdom is in the landed intereſt. Every man, who ſhares in it, has influence over his tenants and followers, and, in a greater or a leſs proportion, may prove an uſeful friend, or a dangerous enemy. If he has malignant diſpoſitions

to the laws and government working in his own mind, it is probable they will not ſtop there, but he will communicate and infuſe the poiſon into others, till his ſchemes are mature for action, and break forth to the terror, if not to the ruin, of his country.

Theſe are the principles of the feudal policy, as far as it may be neceſſary for us to conſider them with a view to the preſent queſtion. They are principles of freedom, of juſtice, and ſafety: the Engliſh conſtitution is formed upon them. Their reaſon will ſubſiſt, as long as the frame of it ſhall ſtand; and, being maintained in purity and vigour, will preſerve it from the uſual mortality of governments.

Let not then the materials of this noble fabric, deſigned by the wiſdom, and erected, at infinite hazard, by the valour, of our anceſtors, become the object of averſion and hatred, or be held in diſhonour and contempt. Formerly, the evidences of our conſtitution were perverted, to ſupport the maxims of ſlavery; they were abuſed, to varniſh over the purpoſes of licentiouſneſs. Happy

it

it is for us, that we live, when the maxims of the one are expoſed, the purpoſes of the other diſclaimed. And, whilſt thoſe evidences are not deſtroyed, concluſions, juſtly deduced from them, will prevail to lateſt times, againſt the artifice of falſe reaſoning, the efforts of vain ambition, and the corruptions of a careleſs poſterity.

This policy has been received, and ſubſiſts, in almoſt all countries of Europe, though differently modelled and diſguiſed; in ſome ſo deformed, as to be abuſed to purpoſes of the hardeſt oppreſſion. The conſtitution of Germany is free. What is the ban of the empire, but a proceſs of forfeiture, iſſued by the emperor againſt princes, who, breaking the fundamental laws, are deprived by the judgment of the ſtates, both they and their poſterity? Matthieu, ſervant to Henry IV. of France, and the hiſtorian of his death, ſays, that he once aſked an avoyer, or ſupreme magiſtrate, in Switzerland, how the crime of treaſon came to be ſo rare amongſt them? "Becauſe, (anſwered the other), we "puniſh traitors with the utmoſt rigour, and "exterminate their families." In Holland,

the penalty of confiſcation was inflicted anciently, by judgment of law, for certain offences. An excellent writer ſpoke in terms too general and inaccurate, when he ſaid*, "in that province it was redeemable for an "hundred guilders." For though it be true, that by ſpecial grants of ſome of the old counts of Holland to certain families and eſtates there, this privilege of redeeming forfeitures prevailed; yet the municipal law of the country was otherwiſe at that time, (notwithſtanding it has ſince received an alteration). This is not only the caſe in the ſeparate adminiſtration of many of the provinces; but we are told, by thoſe who treat of the conſtitution of the Low Countries, That the council of ſtate condemns any officer, who abuſes a public truſt in the finances, the armies, the negociations, or juſtice of the republic, to the heavieſt penalties, by fine, ſuited to the crime, the exigency, and example. And it is much the ſame thing to the children of a criminal, whether the fortune of the family is taken from them by judgment of entire forfeiture, or by a diſcretion-

* Burnet's hiſt. of his own times, 2d vol. p. 522.

ary

ary ſentence condemning to a ſevere fine, which may equal or exceed the value of it. This difference between them is obſervable, that in crimes, where the forfeiture is to be limited by the varying diſcretion of the judges, a man may flatter himſelf, before he contracts the guilt, with ſome ſpecious and tempting arguments, (which we are dextrous enough to invent, when we wiſh to impoſe upon ourſelves), that the conſequences of this kind may be leſs ſevere than the event proves them. But in crimes, to which it is annexed, as an eſtabliſhed puniſhment, there is no room for ſuch arguments; and he may read the certain conſequences in that law, which, as it is the inflexible judge, ſo it ought to be the invariable meaſure, of his actions.

Thus we may reaſon from the practice of free ſtates. Yet one might frame a plauſible objection here: "To what end ſerves a mix-
"ed government, if ſuch ſeverities are expe-
"dient to ſupport it? In popular govern-
"ments, they may be expedient to deter pri-
"vate men from conſpiring to ſet up tyran-
"ny; in kingdoms, a democracy. Schemes
"of civil policy, which are founded on ex-
"tremes,

" tremes, muſt be maintained by them." This is ſo far from being rightly argued, that a mixed government unites and confirms the reaſons, which make ſuch ſeverities expedient, both under popular and monarchical governments. Where things are exactly balanced, the ſtronger defence is neceſſary to protect the ſeveral eſtates, that no one may break in upon the privileges allowed to any other. And, as the law of England is framed with a ſingular felicity, the defect common to republics, a want of power to pardon, or, at leaſt, the difficulty of procuring pardon, is ſupplied, which guards againſt a rigorous ſeverity; and the oppreſſion in ſtate crimes, common to monarchies, is prevented by the well-tempered courſe of proceeding, which guards againſt a dangerous injuſtice. Of theſe particulars ſomething ſhall be ſaid hereafter.

It will be proper to examine, in this place, what eſtates, and what rights of property, were forfeitable by the feudal law; and, in comparing the notions of the law of England with it, this matter will receive the cleareſt illuſtration.

1. All

1. All goods and perſonal things, as money, *&c.* being a man's own, and applicable to any purpoſes he pleaſes, have been eſteemed a proper ſubject of forfeiture. They were taken to be the produce of the feud, belonging to it; and were forfeitable, either in whole or in part, for offences of inferior moment.

2. Feuds, or eſtates in land, whether for years, for life, or deſcendible. 1. In crimes that concerned the lord or feud, whether the feud was *novum, vel antiquum,* that is, firſt granted to the offender, or derived from an anceſtor, it was open to the lord. 2. In crimes, that concerned others, if the feud were ancient, it went to the next branch of the family; if new, it was open to the lord, becauſe feuds, in the firſt inſtance, unleſs it were expreſsly provided otherwiſe, could only deſcend, without inclining to a collateral. In both caſes, the immediate heirs of the criminal were excluded. In this laſt ſpecies of crimes, the ancient feud went to the next collateral relation, though the conſent of the lord, as well as his, was neceſſary to the ordinary

dinary ſurrender or alienation of it. In the former, it returned to the lord, though the conſent of the collateral, as well as of the lord, was neceſſary to the ſame ends; ſo that the power of conveying an ancient feud from a man's heirs, except by crime, was not abſolute in him, without the conſent of both theſe. And yet, in one kind of offences, there is a devolution to the collateral, without the intervention of the lord; and, in the other kind, there is a devolution to the lord, without the intervention of the collateral. This corruption of blood, by which a man cannot have an heir, introduced a very important conſequence into feudal deſcents, That wherever it became neceſſary for one, who would make title to another, to derive the eſtate through an attainted perſon, except where the perſon claiming was particularly deſcribed in the inveſtiture, the attainder was a bar to his title; as in the caſe of a grandchild claiming an eſtate, in fee, from the grandfather, the ſon having committed treaſon, and dying, in the life of the grandfather. Some feudiſts have not been willing to allow this caſe, on account of its hardſhip:

and

and Craig *, a very able and elegant writer on the law of feuds, is diſpleaſed with the judgment in Scotland, which determined the queſtion in that country. He intimates, that this may ſeem ſtrange, the ſon having never been in poſſeſſion, nor being capable of it. And it muſt be admitted, there is a ſeeming hardſhip: yet, becauſe of the rule of evidence in deſcents, by which the ſon muſt neceſſarily be named in conveying the deſcent, the grandchild is excluded. The ſame reaſon governs the caſe of an eſtate deſcending from the uncle to the nephew, if the blood of the nephew's father, (through whom the eſtate muſt be derived from the uncle), be corrupted. But he goes further, and ſays, That allowing this muſt be ſo upon legal notions, yet, at leaſt, the eſtate might have gone over to the next collateral branch, inſtead of eſcheating to the crown, (of whom it ſeems, in the caſe he ſtates, to have been immediately held), ſince it would not be neceſſary for the collateral to convey through the criminal. He might trace his deſcent from the laſt common anceſtor, who was an innocent man,

* De Jur. F. l. 3. tit. 6. § 11.

and

and a good ſubject, without the leaſt notice taken, in making out the line of deſcent, either of the attainted or his poſterity, any more than if that branch of the family had never been a part of it.

If this reaſoning be thought material, it may be ſaid in anſwer, 1. By way of general foundation, that it is a principle in all ſtates, where a man is neither a ſubject by birth or expreſs compact, or has voluntarily renounced the mutual obligations, to conſider him as not within their obedience or even notice. But where he has forfeited his civil rights by crime, he is regarded as ſtill ſubject to their power; and, in every reſpect, within the ſtrict conſideration of the law. 2. That the ancient common law of England clearly proceeds upon this principle. Where a man was not capable of civil rights by nature, as an alien born, and never naturalized, being unknown to the law, he was excluded from inheriting; and the next of kin within the allegiance, who did not claim under him, was admitted; or, where he had incurred civil diſabilities by his own voluntary act, not criminal, as one who entered into religion, or abjured

abjured the realm, he was taken to have undergone a civil death, and the next in courſe of deſcent entered. But where he is attainted of treaſon or felony, the law will not paſs him over, and marks him out *in rei exemplum et infamiam.* Hence it is, that though he never was in poſſeſſion, nor thoſe who claim under him more capable of inheriting than he, by reaſon of the conſequential diſability ariſing from the attainder of the anceſtor, yet the eſtate will be interrupted in its courſe to the collateral, and eſcheat. For it is determined in all the law books, and allowed by the learned writer himſelf, without objection, or heſitation, that if the father of two ſons, of whom the eldeſt is attainted, die ſeiſed of an eſtate in fee, and both ſurvive him, the younger brother will not be heir to the father, becauſe the eldeſt cannot be paſſed over. This caſe would be the ſame, ſuppoſing the attainted brother dead at the time of the father's deceaſe, if he left children, ſince their right of repreſentation, which muſt correſpond to the circumſtances of him who is repreſented, would operate ſo far as to impede the deſcent. And the caſe being put in this manner, as of the attainted ſon dead before

the father, and leaving children, it comes exactly to the caſe * objected to by Craig, of the grandchild diſabled from inheriting the eſtate of the grandfather, by the intermediate attainder of the ſon; in which caſe he thinks, though the grandchild cannot, yet the collateral, (that is, in the caſe here put, the younger brother), might inherit, conſiſtently with the rule of evidence in deſcents. It is difficult therefore to account, how this great writer came to allow an eſcheat, to the prejudice of the younger brother, in caſe the attainted elder ſurvived the father; and to complain of its hardſhip, in caſe he died before the father, and left poſterity behind him. The poſterity of the attainted certainly do not ſtand in ſo fair a light as the younger brother, the immediate deſcendant of an innocent father, and who, in conveying the deſcent, might claim immediately from him. This great writer ſhould have denied the equity of both caſes, when he thought proper to deny one. But the truth is, they ought both to be allowed, as falling under the ſame rule of reaſon and policy, as well as law.

* P. 71.

3. One

3. One may venture to ſay, it is more probably beneficial to the immediate heirs, on whom the hardſhip is thought principally to ly, that the eſtate ſhould fall into the king's hand, than to the collateral branch; becauſe, in this latter courſe, there can be little hope of reſtitution, and it might expoſe families to endleſs jealouſy and diſunion. The king receives more advantage from acts of mercy, than from the coming in of forfeitures: and it is moſt agreeable to reaſon and policy, that the diſpoſition of them ſhould belong to him, who is in law conſidered as the fountain of juſtice, and guardian of the public ſafety. This conſideration might be one inducement, amongſt others, to that petition of the commons, 21 Edw. III.* in which they pray the king, not to alienate his franchiſes. At common law, many lords had, by ſpecial grant, or in right of their counties palatine, royal eſcheats of the lands held within their franchiſes, of perſons attainted. Hence it became their intereſt, from a deſire of enlarging their poſſeſſions, to purſue offenders with an unbecoming violence; and

* Cott. Rec. 1. 58.

the lenity of the crown was precluded by their private right.

3. Titles, dignities, and honours were forfeited, as following the reaſon of lands, being originally derived out of them, or annexed to them by tenure.

4. The loſs of dower, by the ſame law, ariſes from every circumſtance which deſtroys the right of the heir, except it be an act done by the heir himſelf. A woman was to be endowed of the lands, whereof the huſband ſtood ſeiſed at his death. She had an eviction to turn the alienee out of poſſeſſion, in caſe of any alienation made, not completed regularly by livery and ſeiſin: but when the crime of the huſband, or lord, occaſioned forfeiture, the one taking place before the death of the huſband, to deſtroy his ſeiſin; the other, perhaps, after his death, and before aſſignment of dower made to her; the right of the heir being, in either caſe, deſtroyed, her own, though generally favoured moſt highly, ſubſiſted no longer.

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The law of England, which is compounded out of many ſyſtems of law and cuſtom, agrees, in ſome reſpects, with the law of feuds; in others, has a manifeſt advantage over it.

All forfeitures for high-treaſon belong to the king: and by the uſe made of this prerogative, it ſhould ſeem, that he is intruſted with it for the purpoſe of reſtitution to the traitor's family, as it may appear right from circumſtances; to reward the merit of thoſe, who have been faithful to himſelf and the commonwealth; or to be applied to public ſervices, as either his own wiſdom ſhall direct, or the parliament adviſe.

1. As to the forfeiture of goods, and things perſonal, which the party has or is intitled to in his own right, theſe, being entirely in a man's own power, or deſcending to executors, and not his heirs, very properly follow the conviction. Before ſentence, he may apply them to the payment of debts, to the ſubſiſtence of himſelf and family, and

is prevented only from a fraudulent ſale to diſappoint the forfeiture.

2. As to the forfeiture of lands *, by the common law, all lands of inheritance, which the offender had in his own right, and all rights of entry to lands, in the hands of a wrong-doer, came to the king, by attainder of high-treaſon. The inheritance of things not holden, as rent-charges, *&c.* is alſo forfeited. But if a perſon committing treaſon hath, at the time of committing it, only a bare right of action to lands, or a right to reverſe a judgment againſt him by writ of error; this right, neither at common law, nor by the ſtatute 33 H. VIII. is given to the king; becauſe of the danger in unſettling poſſeſſions, and the poſſibility of prejudice to ſtrangers. In like manner, no right of entry to lands, of which there is a tenant by feoffment, or other title, no uſe, (except only lands conveyed fraudulently to avoid the forfeiture), nor condition of re-entry, were liable to be forfeited previouſly to that ſtatute; neither could lands in tail, after the

* Hales's H. P. C. v. 1. c. 23.

ſtatute

ſtatute Weſtm. 2. *de Donis*, except for the life of tenant in tail, till 26 H. VIII.

Before the ſtatute *de Donis*, eſtates tail, being only fee-ſimples conditional, were expoſed to forfeiture like eſtates abſolute. By the words of that ſtatute, *quod voluntas, donatoris obſervetur*, &c. a perpetuity was made, and the donee reſtrained to alienate or forfeit. In a ſhort time it appeared, how much theſe perpetuities were againſt the reaſon of the common law, and the true policy of the kingdom. But the great men not being eaſily induced to make an alteration in parliament, the judges found a way of cutting off an entail by a common recovery, which was a caſe held to be out of that law. Another wound given to theſe perpetuities, was by the ſtatute 4 Hen. VII. which made a fine with proclamations to be a bar to the iſſue in tail, and ſo repealed that clauſe of the ſtatute *de Don. quod finis ipſo jure ſit nullus.* When it was in the power of tenant in tail to alienate, there could not be the leaſt colour or pretence, why his eſtate, over which he was become maſter, ſhould not become forfeitable; for it was under the notion of his being

ing without power to alienate, that eſtates tail were, at firſt, privileged: but the frequent attainders, during the diſputes between the houſes of York and Lancaſter, made parliaments cautious of creating new forfeitures. However, after the complete union of the houſes in Hen. VIII. by conſtruction of the ſtatute 26 Hen. VIII. c. 13. eſtates tail were made liable in caſes of treaſon, where the party was attainted by confeſſion, verdict, or outlawry*; and, by the ſtatute 33 H. VIII. upon any manner of attainder.

There is no occaſion to ſtate all the caſes, either extending forfeitures, or limiting them under the comprehenſive words of the ſtatutes of H. VIII. It ſuffices, that the principle, on which they ſtand, is uniform, and agreeable to juſtice; *viz.* that the offender's rights and intereſts ſhall be forfeited, to the prejudice of himſelf and his heirs, to whom the common law intends no favour, and whom the ſtatute expreſly excludes from any benefit of the ſaving clauſe; but that the greateſt tenderneſs ſhould be uſed in preſerv-

* 3 Co. Dowtie's caſe.

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ing the rights of creditors and ſtrangers in blood. Indeed, in reſpect of lands, forfeiture has a relation to the time of committing the offence, ſo as to avoid all ſubſequent charges and alienations; which may be the cauſe of hardſhip to perſons, who have been unwarily engaged with the offender; but, in laws of public juſtice, it is impoſſible to provide for every caſe of private compaſſion: and the cruelty and reproach muſt ly on the part, not of the law, but of the criminal; who, conſcious that his offence might ſoon be laid open, had the inhumanity to involve others in the conſequences of that iniquity, which proves fatal to himſelf.

There remains a material difference to be noted, between the caſe of a fee-tail and a fee-ſimple *, which is, that, notwithſtanding the forfeiture of lands entailed by an attainder, yet the blood of the attainted perſon is not corrupted, ſo as, by any conſequential diſability, to affect the iſſue in tail. Therefore, if the ſon of the donee in tail be attainted of treaſon, during the life of the father,

* 3 Co. Dowtie's caſe.

and

and die, having iſſue, and then the father dies, the eſtate ſhall deſcend to the grandchild, notwithſtanding the attainder: but it is otherwiſe in the caſe of a fee-ſimple, as has been ſhewn in ſpeaking of the feudal law. The reaſon is obvious; becauſe the iſſue in tail claims *per formam doni;* that is, he is as much within the view and intention of the gift or ſettlement, and as perſonally and preciſely deſcribed in it as his anceſtor. But this is not all. The forfeiture of eſtates tail came in by the conſtruction of the ſtatute of the 28th of Henry VIII. The judges reſolved, that the general words of thoſe ſtatutes comprehended theſe eſtates. But then ſuch laws being of a penal kind, though they are to be conſtrued ſo as to attain their full effect, yet they are to be conſtrued ſtrictly; and, however they might extend to make eſtates tail liable to forfeiture, where they are actually in the offender's poſſeſſion, and conſequently in his power to alienate, they could, by no rules of conſtruction, be extended to bring conſequential diſabilities on the heir, where the eſtates have not been in the offender's poſſeſſion. The forfeiture of fee-ſimples

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is by cuſtom immemorial, or at common law, which corrupts the blood of the criminal in caſes of treaſon; ſo that no perſon, who muſt make his derivation of deſcent to or through the party attainted, can inherit. But, wherever he need not be mentioned in the conveyance of deſcent, as between two * ſons of an attainted father, nothing hinders one brother from inheriting to the other; ſince, agreeably to the rule of law, the deſcent is immediate: he can make himſelf heir to the perſon laſt ſeiſed, without the mention of the father.

All this is clear: yet it may be ſaid, "That "the old law, as to impeding deſcents, has "been altered in an inſtance ſomewhat re- "ſembling this caſe of corruption of blood "in treaſon, the caſe of aliens. Anciently "the eſtate ſhould ſooner eſcheat, than an "alien might make title to it himſelf, or "convey one to another. But the ſtatute "11 and 12 W. and M. c. 6. clears the "interruption of deſcent, occaſioned by an "alien anceſtor, in favour of natural-born "ſubjects." This ſtands upon a ſingle rea-

* 1 Ventr. 413.

ſon.

ſon. Lands deſcending to an alien might not be taken by him, becauſe the king could not oblige his perſon and ſervices. And it ſeemed hard, that ſubjects, within the allegiance, who claimed under him, ſhould be diſabled from conveying deſcent, by the operation of a reaſon, of which the very reverſe was true, as to themſelves. But who are the aliens enabled for this purpoſe? Aliens, (as the law ſays), by the act of God, the fortune of climate, the decree of nature. And in favour of whom are they enabled? Of ſuch as are not at all affected by the reaſon which excludes aliens. But were the ſame ability given to attainted perſons, it would be to admit thoſe to a legal right, who, though bound to the community by nature, moral duty, and experience, have diſclaimed the law, and are diſclaimed by it; and, by their own voluntary act, have ſhewn themſelves aliens in affection. It would likewiſe be in favour of heirs, whoſe intereſt, in this caſe, is not ſeparated from that of the anceſtor, both upon the general notion, that the latter can bind the right of the former, at his pleaſure, in many inſtances; and upon the particular arguments unavoidably affecting both, which

which have been drawn from juſtice, and the public good.

To ſhew how expedient theſe puniſhments are thought, and how much the law conſiders them as eſſential to its own preſervation, it may not be improper to obſerve, that a corruption of blood, by attainder, is a thing of ſo high a kind, as that the king's pardon can only reſtore, as to iſſues born after; but an act of parliament is neceſſary for the reſtitution of blood, in its full nature and extent. That corruption, however, goes only to eſtates deſcending, in the courſe of inheritance. So it was in the feudal law. Nothing the heir takes, by purchaſe, is affected. He is capable, under a teſtamentary deviſe, or family ſettlement, or legal grant of any kind to himſelf. But here the law of England happens to vary from the feudal law; becauſe, by it, all forfeitable lands are alienable at the pleaſure of the party in other ways than by forfeiture: whereas, in the feudal policy, they were forfeited, though not alienable or chargeable in any way by the ſole will and power of the tenant, and

merely deſcendible to his next heir upon his death.

3. Titles of honour and dignities, by tenure, were always forfeitable in the law of England, as following the feudal reaſon of lands. And thoſe which are by writ and patent, whether to the heirs general, or in tail male, are forfeited by the corruption of blood, which impedes the deſcent, and renders a family ignoble. The right of peerage is a ſpecial truſt repoſed by the crown for the ſupport of government; and even before the 26 H. VIII. (within which, an honour granted to a man, and the heirs males of his body, has been reſolved by all the judges to be forfeitable), it was not protected by the ſtatute *de Donis*, like lands entailed, becauſe of the condition tacitly annexed to the ſtate of dignity; in the ſame manner, as if tenant in tail of an office of truſt miſuſe or uſe it not, it is liable to forfeiture by force of the condition; as has been laid down in ſeveral books *. Beſides, it ſeems politically fit, that the eſtate being gone, the honours

* Nevil's caſe, 7 Co.

ſhould

ſhould be taken away, becauſe wealth is neceſſary to ſupport their dignity, and without it they are an incumberance, and a prejudice.

4. As to the loſs of dower, it is to be juſtified in our law, on the general principle, that ſociety may beſtow rights on what limitations it thinks fit, for its own ſafety, and on the ſtrength of the conjugal ties to deter men from treaſon. In the feudal law, it is ſupported, not only by theſe principles, but by artificial reaſoning; becauſe the loſs of dower ariſes from every circumſtance, which deſtroys the right of the heir. But by our law, dower is ſubſtantially affected, after the title to it accrues, which is underſtood to be inſtantly upon marriage, by no act of the huſband, except the crimes of treaſon.

Theſe are the ſeverities, by which the Engliſh conſtitution binds the obſervance of itſelf upon the fears of men, when better principles have loſt their effect upon the conſcience. They are eſtabliſhed to bear ſome proportion to the greatneſs of the crime, that

he may thus ſuffer, as Lord Coke ſays*, "who intended to tear and deſtroy the ma-"jeſty of government."

And now, after ſtating and explaining the ſeveral rights of property, affected by the conſideration of this argument, an objection may probably be made, that, to one of a plain underſtanding, the caſes, which have been mentioned of impeding deſcents by corruption of blood, carry with them a ſeverity to be juſtified upon no ſound natural principles, and are governed by artificial conſtruction.

To this there are two anſwers: 1. From a general principle already laid down in this eſſay, that the laws of deſcent, as poſitive inſtitutions of ſociety, may be regulated on ſuch conditions as ſeem beſt to itſelf; and being previouſly marked out, and uniformly interpreted, no man has real cauſe to complain.

2. In all laws, there are caſes which depend upon artificial reaſoning. If the gene-

* 3 Inſt. p. 211.

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ral ground-work be juſt and ſolid, though ſome hard caſes are taken in, or governed by that reaſoning, they are often not to be remedied or avoided, without danger. The fundamental rule of evidence in deſcents, that whoever would make title to an eſtate, muſt prove himſelf heir to the perſon laſt ſeiſed, is held ſacred. The principle, that no one, who has committed treaſon, can have an anceſtor, or an heir, is equally wiſe, and reconcileable with juſtice. When theſe maxims concur in any caſe, they form what is, in legal phraſe, an impediment from corruption of blood. And they are ancient and extenſive maxims. The beſt lawyers of all ages have been ſo ſenſible of the inviolable regard due to legal principles, that they have thought it more ſuited to the genius of laws to relieve by fiction, than to depart from principles. The *jus poſtliminii* of the Roman lawyers, which reconciled the known rule, that no ſlave was capable of making a will, with the caſe of a citizen taken in war, ſuppoſing him, if he returned home, always to have remained free, or, if he died in the enemy's hands, to have died before he became captive; is a celebrated inſtance of this. The tranſitory actions of

the law of England furniſh another inſtance of it. It is an excellent conſtitution, that all iſſues ſhall be tried in the county, where the cauſe of action ariſes, for the ſake of bringing juſtice home to the parties, and for the attendance of jurymen and witneſſes: yet, becauſe that may be often inconvenient, the plaintiff is admitted, in many caſes, to lay and try his action in what place or county he pleaſes. Now, the end and extent of theſe fictions is obſervable: they both except particular caſes out of general principles; the one for the advantage of thoſe, who have fought gallantly in defence of their country; the other for the furtherance of juſtice; yet with ſafety to thoſe principles. But no fiction could be invented in this caſe, without a ſubverſion of principles; and that not in favour of one who has defended his country, but to preſerve and tranſmit the inheritance of him, who would have betrayed or deſtroyed it. Thus one may argue, without reſorting to the maxim, that the king's right ſhall not be barred by any fiction; the mention of which, on this occaſion, would carry leſs of reaſon than authority. Indeed, the legiſlative power may, by poſitive ſtatutes, alter the common

mon law, and limit the operation of its principles: and the proviſo, in the 7th Ann. c. 21. by which the offender can forfeit a real eſtate only for his own life, was deſigned to make that alteration. But, whenever it takes place, let what will follow be obſerved:

1. It is conſiderable, that ſince the forfeiture of real eſtates has a relation to the time of committing the offence, a man having loſt all power over them from the moment of his guilt, that act will give treaſon the effect of a ſettlement. The anceſtor's iniquity will convey a benefit to the heir; which is an abſurdity allowed in the law of no country, and ſubverts the order of nature.

2. It is defective, and inconſiſtent with itſelf. For the forfeiture of perſonal eſtates will ſtand intire. So that if a rich trader of London, who has no eſtate in land, commits treaſon, the cuſtom of the city, which makes a diſpoſition of his fortune for the ſake of his heirs, is defeated: which cannot be juſtified on any principles, that do not equally conclude

conclude to take away real eſtates for the like crimes.

3. It will bring ſtrange inconſiſtencies into the law, whoſe ſeverities are, at preſent, applied in proportion to the heinous nature and effect of crimes. Treaſons of the higheſt kind occaſion forfeitures in the manner which has been ſtated. Inferior treaſons, as thoſe relating to the coin, do not extend to corruption of blood, and loſs of dower. Petty treaſon extends to all, except the loſs of entailed eſtates. The higher felonies to all, except loſs of eſtates tail, and dower. Some felonies are allowed the benefit of clergy, which ſaves life, and the inheritance of lands, though not the immediate profits; and diſcharges under certain terms. Sometimes, where clergy is not allowed, there is a ſaving againſt corruption of blood, loſs of dower, and diſheriſon of the heir. And ſome are followed by no forfeiture, even of goods or chattels. Shall then ſeverer penalties be inflicted on him, who has deprived the meaneſt ſubject of his life, than on him who has attempted to throw his country into confuſion, to ſtop the ſources of government,

ment, and to render thoſe rights and that protection precarious, which alone give a value to life itſelf?

But it will be ſaid, for the ſake of maintaining a loſt argument, That it is to be wiſhed all forfeitures were abrogated. Be it ſo. And let the reſt of Europe imagine to themſelves, and be aſtoniſhed, either that the virtue of the Engliſh nation is ſo great, as to make the ordinary ſanctions of legal authority ſuperfluous; or, that thoſe iniquities, which weaken government, and cancel all the bonds of nature and ſociety, are of ſuch extenſive influence, as to prepare an impunity for themſelves to the completion of our ruin.

It is impoſſible to debate this matter, without entering into the general arguments in defence of the ancient conſtitution; though what gave occaſion to the debate, was only a temporary proviſion in ſupport of it. And, as to the act of the laſt ſeſſion, relating to the pretender's ſons, which contains that proviſion, thoſe, who had the honour of framing it, proceeded upon the moſt generous views; the ſafety of this eſtabliſhment, and

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an abhorrence of every attempt to overthrow it. To have exempted this treaſon from the policy of forfeiture, had been doubtleſs very ſtrange. And it would have ſeemed equally ſtrange, that in a bill, which concerns the ſons, the proper ſanction, originally given to it, ſhould laſt only till the death of the father, one not intereſted in its contents, and not till the death of thoſe, who ſtand in his place, and are particularly intereſted in the purport, and guarded againſt by the intention, of it. Let it be remembered too, that neither the pretender, nor his family, if, by any calamitous reverſe for this nation, they ſucceed in their deſigns, will think themſelves bound * by the proviſo in the ſeventh of queen Anne, nor by any laws made ſince the Revolution. Why then ſhould not the ſame terrors be ſet on the ſide of the proteſtant ſucceſſion, as are in the hands of its enemies, and which have been the ſafeguard of our kings from the foundation of the monarchy?

* Since the firſt edition of this diſcourſe, the pretender's ſon, in a paper dated 10th October, 1745, and publiſhed in Scotland, has declared all the laws made from the time of the abdication to be in themſelves null and void.

Cicero

Cicero has words very applicable to this purpoſe: "When (ſays he) we are intreated "to have mercy on the poſterity of a trai- "tor, what ſecurity is given, that ourſelves "ſhould not undergo the moſt cruel puniſh- "ments, if the crimes of the father ſhould "proſper?" The notions of Cicero, occaſionally ſcattered in his works, are very wiſe upon this ſubject; and the more to be regarded, becauſe he never ſhewed a warmth of ſpirit, in circumſtances, which required coolneſs, to perplex the meaſures, heighten the reſentments, or inflame the ſedition of his times; but reſerved it to ſecond the efforts of his own prudence, in conducting affairs of great difficulty, and laſting importance to his country. In one of the orations he intimates, in a few words, that laws of terror, in the Roman commonwealth, had the appearance of the ſevereſt juſtice, with the intention and effects of mercy; "That the fear might ex- "tend to all, but the puniſhment to few *." True it is, they contain a power, to be exerted only in the dangers of the ſtate; like

* *Ut metus videlicet ad omnes, pœna ad paucos perveniret.* Orat. *pro* A. Cluent.

Goliah's

Goliah's ſword in the tabernacle, not to be taken down but on occaſions of high neceſſity: at other times it ſhould ly ſheathed and untouched in the ſtatute book; as the ſame great writer phraſes it, *in tabulis tanquam in vagina reconditum.* If one may judge of the ſpirit of the law of England by the declarations of its profeſſors, it ought not to be forgotten, that my lord Coke delivers no maxim with greater pleaſure than that of Ciro; and repeats it in ſeveral parts of his inſtitutes. But the moſt pregnant arguments of lenity and wiſdom, in providing for the gentle as well as juſt adminiſtration of this power, are to be found in the law itſelf.

I. In the tenderneſs ſhewn to the poſterity of offenders, in reſpect of ſettlements in truſt to preſerve remainders, and declarations of uſes on common recoveries. Many families are poſſeſſed of them, eſpecially ſuch as are formed for great things: and men, who enter into deſperate engagments, are commonly cautious enough to protect ſome part of their eſtates in that manner. The law affords means of avoiding the hardeſt and moſt

moſt exceptionable caſes of forfeiture. Inſtead of dower, jointures are become general, which forfeiture does not touch. The grandfather may, by will, deviſe his eſtate in fee-ſimple to his grandſon; and ſo may the uncle to his nephew, affected by the corruption of the father's blood; and they are capable of taking. Nor is it of ſmall advantage to the heir, that the death of the anceſtor, before conviction, diſcharges all proceedings and forfeitures. He can then be attainted only by act of parliament. It has been intimated, that the ancient Roman law was much harder in this matter.

II. In the exact juſtice, which is ſhewn to the offender himſelf. And that in two ways:

1. By the clearneſs and certainty of thoſe laws which mark out the crime. An overt-act of ſome ſtatute-treaſon muſt be laid in the indictment, and proved in evidence by two witneſſes, whoſe competency is laid under many reſtrictions for his benefit. No man is to be reaſoned out of his life and fortune by ſubtle analogy, and rhetorical aggravations, inhancing miſdemeanors into trea-

ſon, as was anciently the caſe, even in ordinary courts of juſtice.

2. By the fairneſs of the trial; the independence of the judges; the preſentment of one jury, the verdict of another, in effect choſen by the priſoner, (conſidering the large number of challenges allowed him), to paſs ſentence on himſelf; admitting his witneſſes, by oath, to the ſame means of legal credit with thoſe for the crown; and the limitation of three years for calling any man to account, except in one * caſe, mentioned in an act of parliament. Theſe things, as they are regulated in our law, reconcile all the points of wiſdom and juſtice, in not making guilt leſs obnoxious, but innocence more ſafe. A conſiderable part of the ſecurity againſt the abuſe of forfeitures is owing to that excellent ſtatute, 7 William III. c. 3. which has, in ſeveral particulars, improved the trial of commoners, and leſſened the power of the crown in that of the lords. The conſequence has anſwered the good intention of

* The caſe of a deſign or attempt to aſſaſſinate the king by poiſon, or otherwiſe, is excepted out of the limitation in ſtat. 7 W. III. c. 3.

the

the framers, that men might be tried for all which is dear to them, *ſine judicum ſævitiâ, aut temporum infamiâ*, without cruelty in the judges, or diſhonour to the times. Let the argument then againſt this puniſhment have been formerly as ſpecious as it might, it can ſcarce be colourable now. To diminiſh it, after giving the greateſt latitude of defence, would furniſh a real encouragement to treaſon, by making a greater proviſion for the ſafety of thoſe, who are accuſed of it, than of other capital crimes leſs pernicious, and diſappointing the moſt weighty ſanctions of that law, which puniſhes the traitor.

III. In the tenderneſs ſhewn to the offender, by allowing a reſort for pardon in the prerogative of the crown. For though laws are not to be framed on principles of compaſſion to guilt, yet juſtice, by the conſtitution of England, is adminiſtred in mercy. It is the great duty required from the king by his coronation-oath, and that act of his government, which is moſt intirely his own, and perſonal. According to the expreſſion of the celebrated Lord Strafford, "The "king condemns no man: the great opera-

" tion of his ſceptre is mercy." And in an old * record it is ſaid, that " his mercy " is appropriate to himſelf above all the " other ſtates of his regality." In moſt republics, this power, if it ſubſiſt at all, is ſo reſtrained, and difficultly exerted, as almoſt to make good the complaint of the young men in Livy, that a man muſt *ſolâ innocentiâ vivere.* In Holland, without a ſtadtholder, there is no ſuch power of pardoning, notwithſtanding it is eſſential to policy; as neceſſary as juſtice itſelf; and giving it a perfection and amiableneſs, which ſome have thought not originally belonging to its nature. The emperor Hadrian underſtood it ſo well, that, in conſideration of the particular circumſtances of Albinus's children, he granted them portions out of the confiſcation, ſaying, " That his authority was bet- " ter ſtrengthened by gaining the affections " of men, than by enriching his coffers." There is no character more branded in hiſtory, than that of an inexorable prince, who can ſuffer ſo divine a power, intruſted for the good of his people, to ly dormant.

* 1 H. 4 Rot. Parl. entitled *Plac. Cor. in Parl.*

His

His own intereſt is little underſtood by him; and his conduct becomes, to the laſt degree, abſurd, as well as deteſtable, if he governs a free people; ſince it is not only to carry juſtice, in ſome inſtances, to the height of injury; but it is, in reſpect of himſelf, to be dangerouſly juſt. In England, the greateſt weight has always been laid upon the prerogative of pardoning; which appears from this; that when endeavours have been uſed to bound the exerciſe of it, the ſenſe of the nation has diſapproved them in parliament. By the ſtatute 13 Rich. II. c. 1. the king is reſtrained to grant pardon of treaſon, murder, *&c.* but in a ſpecial manner; and it is made penal for any officer of ſtate, or ſubject of the king, to intercede for ſuch a pardon, which alſo cannot paſs by immediate warrant. But three years were hardly elapſed, before the commons acknowledged themſelves the ſufferers by that law; and, in the 16th year of the ſame king, a very conſiderable part of it is repealed. To ſay the truth, this prerogative is generouſly exerciſed amongſt us, nor can it be regarded as a contemptible abatement of the ſeverity of forfeitures, both becauſe the law, repoſing a con-

fidence in the king, will not ſuppoſe him inclined to act wrong in the things ſubmitted to his wiſdom, and becauſe, ever ſince the union of the two houſes of York and Lancaſter, it has been employed to the peace and preſervation of the ſubject, not rigidly withheld to his deſtruction. The clemency of the crown has appeared not only in pardons paſſed under the great ſeal, but in the previous conſent always given to bills of reſtitution, as well as the final approbation of them. The records of parliament, even in the worſt times, are not wanting in examples of it; in good times it has ſhone forth with the brighteſt luſtre. From ſome of thoſe bills we may obſerve, that, within a few years after the anceſtor's attainder, families have been reſtored, as if they had merited it by their modeſty and prudence. Hence they have been enabled to retrieve their loſt honour by memorable ſervices; and are held obliged to a diſcretionary lenity for the enjoyment of inheritances, which, deſcending in the ordinary courſe, might have provoked dangerous emotions of family-pride, or partial regard to their anceſtor; would have furniſhed gratifications of rage, or inſtruments of revenge,

inſtead

inſtead of compoſing to peace, or raiſing the ſentiments of gratitude; a gratitude heightened by the reflection, that theſe inheritances had been juſtly forfeited to the laws of their country.

If we may conſult foreign annals on this point, we ſhall find a remarkable illuſtration of it related by Mariana *, in the conduct of king John of Portugal, who, upon an occaſion, which might have urged arbitrary princes to great lengths of jealouſy and revenge, tempered juſtice with mercy, to his own honour, and the advantage of his kingdom. He uſed to ſay, that government either found princes wiſe, or made them ſo; and, being grown unpopular from a ſeverity of temper, and freedom of expreſſion, many of his nobles, with the duke of Braganza at their head, carried on a formed conſpiracy againſt him. He concealed his knowledge of it for ſome time; and, when it was breaking out into action, ſeized and puniſhed ſeveral, and their eſtates were forfeited. The duke of Viſco, his couſin-german, ſuffered for the

* L. 24. c. 10.

plot.

plot. But, inſtead of with-holding his eſtate from the family, he engaged their affection, by giving it to his brother Emanuel, and raiſed up an admirable inſtrument for the good of Portugal and himſelf, in one who might have proved a factious and alienated ſubject. Emanuel ſucceeded him in the throne, reſtored the duke of Braganza's children, regulated the execution of the laws, and brought the wealth of both Indies into Portugal, by encouraging the diſcoveries of the new world. Something like this has happened not unfrequently in kingdoms governed at the deſpotic pleaſure of the prince. How much oftener has it taken place in England, a limited monarchy; and with what greater probability will the bleſſing be ſecured to us, ſince that ſettlement of the nation, which added new life to the liberties of the people, reduced the conſtitution to its right baſis, and gave it its proper force and energy! In ſuch circumſtances, we may apply to the throne, what was ſaid by an ancient poet, of the altar erected by the Athenians to Compaſſion:

——*Mitis*

——*Mitis poſuit Clementia ſedem,*
Et miſeri fecere ſacram——
Huc victi bellis, ſcelerumque errore nocentes,
Conveniunt, pacemque rogant——.

Upon theſe principles, the objection on the part of the crown, as if its being inveſted with this power were of no moment to the hopes of families, ſeems rationally anſwered. As the exerciſe of the juſtice of government is thus ſoftened and reſtrained, what public danger can ariſe from private deſpair? And ſuppoſe the danger to ariſe, is it not in government inſtantly to repreſs ſuch efforts, where juſtice is not diſtributed by faction, but regulated by law, applied to ſave the conſtitution, and adapted to the genius of the people? It cannot be denied, that, in hiſtory, there are a few examples, but principally deſtructive to the authors, in which our princes have, in matters of treaſon, preferred dark, hurtful, and cruel counſels, to open, wiſe, and juſt proceedings. They are not to be inſiſted upon. There is a decency required, in reciting the faults of paſt times.

We

We may look back for information and warning, and even for reproof, but not invective. An alteration of circumſtances renders their renewal almoſt impoſſible; and, ſurely, it may be ſaid, without offence or flattery, that, whether it be purſued at large, or paſſed over in ſilence, it is a ſubject, which neither the moſt ſuſpicious friend can call invidious, nor the moſt malignant enemy will think to be expedient, in this reign.

The great lawyers of the kingdom, men wiſely and conſcientiouſly zealous for national rights, have expreſſed the higheſt veneration for the law of treaſon eſtabliſhed in England, and ſeem more concerned for the certainty of it, than to leſſen the ſeverity. Lord Hale * ſays, "That treaſon, being "the greateſt crime againſt faith and duty, "is deſervedly branded with the higheſt ig-"nominy, and ſubjected to the greateſt pe-"nalties which the law can inflict." Lord Coke, in the beginning of his third Inſtitute, enumerates the names of the principal judges,

* H. P. C. I. p. 86.

who

who ſat in Weſtminſter-hall at the time of making the ſtat. 25 Ed. III. and thoſe ſubſequent ſtatutes made as opportunity offered, in confirmation of it, to deſtroy arbitrary determinations, which endeavoured to elude it. "All theſe, ſays he, we have named in "honour of them and their poſterities, for "that they were great furtherers of theſe "excellent laws concerning treaſon. This "was done, that the fair lilies and roſes of "the crown might flouriſh, and not be "ſtained by ſevere and ſanguinary ſtatutes." Why ſevere, and why ſanguinary? Becauſe the deſcription of crimes *, by which a man might expoſe himſelf to penalties, was ſo various and uncertain, that no one knew how to ſpeak, act, or behave himſelf, in any manner. But, had he diſapproved the forfeiture of real eſtates, in caſes of high-treaſon, as unjuſt, he never would have commended laws, as clear from ſanguinary ſtains, which refer expreſly to that policy. Nor in another place would he have ſaid, *Lex Angliæ eſt lex miſericordiæ.*

* Stat. 1. H. IV.

It

It may be mentioned, as an argument for aboliſhing the ſeverity of the puniſhment, that " It is ill-proportioned to the crime; " for, by the law of England, treaſon is in- " tirely applied to ſuch offences, as may in- " jure the perſon and adminiſtration of the " prince, or ſupreme magiſtrate, without " aiming at thoſe which may be incurred " againſt the people by that adminiſtration " itſelf, and is therefore partial and defec- " tive. By the law of Rome, it is applied " to ſuch offences, as affect the ſtate and " people. Hence the inference is natural, " that the forfeiture of inheritances is a " ſecurity to the prince, but none to the " people; and conſequently, as it ſtands in " our law, is to be compared with forfei- " tures in countries ſubject to arbitrary pow- " er, and not to be illuſtrated from free go- " vernments and republics. This opinion is " favoured by Nat. Bacon, a partial and ſy- " ſtematical writer on the conſtitution, who " ſays, that amongſt our anceſtors, " Treach- " ery againſt the country was death, and " forfeiture of the whole eſtate both real " and perſonal. Againſt the king, it was on-

" ly

" ly loſs of life and perſonal eſtate:" from " whence he concludes, that majeſty was not " in thoſe days arrived at its full growth."

Without examining how far this fact is truly ſtated, and the gradual progreſs of the royal prerogative, the propoſition will admit an eaſy anſwer upon legal notions; yet, eaſy as the anſwer may ſeem, it leads to matters of a very high nature, and perhaps ſuch as ought not to be treated any-where, nor can be treated in a manner equal to their extent and importance, but in a court of law, or in full parliament. However, whilſt they are treated upon the principles of the conſtitution, as pointed out in our laws and hiſtory, the entering into them, though imperfectly, may be of uſe in this queſtion, and prove a ſatisfaction to ſome minds. The king is conſidered, in law, in two different capacities, the politic, and the natural. In his politic capacity he never dies, nor is ſubject to infancy; is under the happy inability of doing wrong, becauſe acting by his officers, and limited by law; combines characters and powers of ſuch a kind, as to make him one of the three eſtates in the conſtitution; and forms that

eſtate which gives life and motion to the reſt. He repreſents the kingdom in tranſacting with foreign countries for the purpoſes of peace or war. He has a controul in the making of laws; and when made, without his adminiſtration of them, they are a dead letter. He is the fountain of honour, juſtice, and mercy. The executive power of the government is lodged intirely in his hands; and for this reaſon offences are referred to him, as being in contempt of that power, and to be puniſhed by it. Treaſons which concern the repreſentation of his authority, or the inſtruments that convey it to the people, as his ſeals, his coin, and certain great magiſtrates, in the execution of their office, relate to the allegiance which the ſubject owes him in this view. In like manner, treaſons, which concern the ſafety of the kingdom in reſpect of foreign invaſion, or open rebellion, or ſecret conſpiracy; in a word, all crimes of a public nature, and even injuries to private perſons; are ſuppoſed to be againſt his peace, dignity, and crown. So that, what in other free countries are called laws relative to public crimes, or crimes againſt the ſtate, paſs in England under the general denomi-

denomination of *placita coronæ*, or crown law.

Nor can the ſtatute law of treaſon be reaſonably charged with defects, as only comprehending caſes in which private men oppoſe themſelves to the authority of government; ſince ſeveral abuſes of that authority itſelf fall within the care and reach of it. If a governor of one of the king's fortreſſes ſhould ſurrender it out of treachery to an invading enemy; if a ſecretary of ſtate, employed to negociate matters preparatory to treating with an enemy, at the cloſe of a foreign war, ſhould receive bribes, and betray the intereſt of the realm in concluding the treaty; would not both the governor of the fortreſs, and that ſecretary of ſtate, be guilty of high-treaſon within the clauſe of * *adhering, and giving aid and comfort to the king's enemies?* It is ſcarce conſiſtent with that modeſty, which the profeſſors of the law obſerve in putting caſes relative to ſtatutes of this kind, to propoſe any other than thoſe, which have exiſted in fact, or fall clearly

* Stat. 25 Ed. III.

within the letter of them. But ſome will think it neceſſary to the illuſtration of this argument, to put a ſtronger caſe, in which the perſonal commands of the king will not exempt a miniſter from the charge of high-treaſon. Suppoſe then an officer of the crown, under colour of the king's commands, ſhould iſſue commiſſions contrary to the bill of rights, to raiſe an army in time of peace, without the conſent of parliament; and, engaging a faction in the ſcheme, ſhould aſſemble troops together, procuring loans from the people, by the terror of them; what would the offence be deemed? Were a bill of indictment for high-treaſon found on this matter, the judges in Weſtminſter-hall might have no doubt upon it in their private thoughts; and yet, by reaſon of the unexampled nature and conſequence of it, would tranſmit the record into parliament, and obtain their declaration agreeably to the wiſdom of that great act 25 Edw. III. which recommends this method to them as the ſafeſt in ſuch caſes, before any proceeding to judgment. When it came before the parliament, a ſtrict attention would be given to thoſe uniform reſolutions of the beſt times on the

clauſe

clauſe of *levying war*, as particularly in the caſe of aſſembling to throw down all incloſures generally throughout the kingdom, or all meeting-houſes, the firſt during the reign of queen Eliſabeth, the other during that of queen Anne; from which it appears, that it is war againſt the king, when intended for the alteration of the laws and ſettled government. It would perhaps be ſaid in the two houſes, though formerly an abhorrence was expreſſed in the * militia oath, of taking up arms by the king's authority againſt his perſon; yet ſince the repeal of the cauſe in the act preſcribing that oath, it cannot be extravagant to affirm the converſe of the doctrine, that it is unlawful, and even treaſonable within the ſtatute, to take up arms by warrant from the king's perſon againſt his authority. The producing of a paper under the king's ſignet, which might be called the warrant, is no juſtification. The law not only conſtrues it to be void, but ſuppoſes it not the royal act, nor will receive it in evidence. And if ſufficient overt-acts can be fixed upon this officer, as the inſtrument to execute the purport of it,

* The oath was appointed 13 and 14 Car. II. c. 3. and repealed 1 W. and M. c. 8.

he is anſwerable for it: ſuch being the wiſdom of the conſtitution, as when it has inveſted the crown with the largeſt powers of action, to make the inſtruments and organs of thoſe powers account for the abuſe, or the exceeding of them, at their own peril; and thus they become a kind of controul in the very exerciſe.

As to offences of a lower kind, (which ought never to be conſtrued into treaſon, where the ſtatute will not warrant it), ſuch as the evil advice of miniſters influencing the king, not indeed to exceed the limits of his power, but to abuſe the diſcretion with which his people have intruſted him, the proceeding by impeachments of the commons for high crimes and miſdemeanors, is a complete remedy, and according to the degree and height of the offence, the judgment may be proportioned in parliament.

Now if any one think, in caſe the king ſhould unhappily and obſtinately intereſt his perſon, in ſupporting the actions of his miniſters againſt the clear and eſtabliſhed laws of the land, that the principles of a conſtitution,

tion, ſo limited and controuled in all the parts of it, ſeem to warrant the providing of a judicial remedy againſt him, as againſt another magiſtrate or miniſter of ſtate; the anſwer to this chimera is plain: that every conſtitution of government has its peculiar caſes tending to diſſolution, beyond the power of any ſtated remedy, even though it be the mixed form of government, which both avoids thoſe, to which other forms are ſubject, and is leſs frequently in danger from ſuch convulſions, as are proper to itſelf. The Engliſh government therefore, notwithſtanding its durable nature, and ſingular advantages, partaking in ſo large a degree of monarchy, the caſe here propoſed would be a caſe tending to diſſolution, not to be ſubjected to the ordinary proviſions of law. The reigns of Charles I. and James II. are evidences of this. And it ariſes from the nature of the thing; becauſe the king of England (unlike the kings of Sparta or Arragon, with their Ephori and El Giuſticia, officers appointed to inſpect and judge their actions) is not only a magiſtrate or general, but compoſes an eſſential part of the ſupreme power. So that, on the one hand, ſhould a future king

king attempt to ſubject the crown and people to a foreign yoke, or to ſet up a general diſpenſing power by proclamation, to controul the operation of all the laws; theſe would be caſes manifeſtly tending to diſſolution. Or ſhould he ſummon the lords to aſſiſt him in the making of laws without the repreſentative body of the commons, and the lords, inſtead of mediating, ſhould ſupport him in the arbitrary deſign of excluding the commons from a ſhare in the legiſlature, it would be a caſe tending to diſſolution. And though the law will not ſuppoſe the poſſibility of the wrong, ſince it cannot mark out or aſſiſt the remedy; yet every member of that repreſentative body might exclaim in the words of Craſſus the Roman orator, when he oppoſed the encroachments of a tyrannical conſul on the the authority of the ſenate; *Ille non conſul eſt, cui ipſe ſenator non ſum:* He is no king, to whom we are not an houſe of parliament. On the other hand, ſhould the repreſentative of the commons, like that of Denmark, ſurrender the rights and liberties of the people into the hands of the king, and the king, inſtead of diſſolving the parliament, ſhould accept the ſurrender, and attempt to maintain it, contrary

trary to the laws, and to the oath of the crown; or ſhould the two houſes take the power of the militia, the nomination of privy-counſellors, and the negative in paſſing laws, out of the crown; theſe would be caſes tending to diſſolution: that is, they are caſes which the law will not put, being incapable of diſtruſting thoſe, whom it has inveſted with the ſupreme power, or its own perpetual duration; and they are out of the reach of laws and ſtated remedies, becauſe they render the exerciſe of them precarious and impracticable. This obſervation may be applied to every ſimilar caſe, which can be formed in imagination, relative to the ſeveral eſtates; with this difference, that it holds ſtrongeſt as to the king, in whom both the common and ſtatute laws have repoſed the whole executive power: nor could the leaſt branch of it be lodged in the two houſes, for the purpoſe of providing a judicial remedy againſt him, unleſs the conſtitution had erected *imperium in imperio*, and were inconſiſtent and deſtructive of itſelf. Should it then be aſked, What! has the law provided no remedy in reſpect of the king? and is the political capacity thus to furniſh an exemption to him in his natural, from being called

called to account? the law will make no anſwer, but hiſtory will give one. When the king invaded the fundamental conſtitution of the realm, the convention of eſtates declared an abdication, and the throne vacant. Indeed the political character, or the king conſidered as an eſtate, ſtill ſubſiſted in * notion and

* If it be thought that this is a legal ſubtilty, reſembling the ſubſtantial forms of the ſchoolmen, which might ſubſiſt when the matter was gone, it may be ſaid, that though ſubtilties can anſwer no good purpoſes in philoſophy, yet they ſometimes anſwer very great and excellent purpoſes in the law, as particularly in this reaſoning applied to the caſe of the Revolution. The reſult and ſtrict conſequence of the inſtances of mal-adminiſtration, called, in the votes of the convention-parliament, "endeavours to ſubvert the conſtitution," was, that the whole frame of it was in fact diſſolved; ſince the conſtitution is a mere *ens rationis* without the exerciſe of the government, and the lords and commons cannot be regularly convened, nor exert any powers, without the concurrence of the king. But had there been a declaration, that it was diſſolved, the people muſt have been free to chuſe a new form of government; and all the uſurpations, under which they had ſuffered, after aboliſhing the monarchy, and the viſionary ſchemes of government, which the fruitful fancy of that age produced upon the death of Charles I. and of Cromwell, would have been again revived, to the diſorder and ruin of the nation. What then ſaid the convention? On the one hand, they put an end to any hopes, which might have been raiſed in favour of

and judgment of law; the right of the people to be governed by a limited monarch, according to the ancient exercise and distribution of powers between the three estates, remained as much as ever: but the exercise of the government was suspended, which made it a case tending to dissolution. And being extraordinary, the remedy suggested itself, and was suited to the necessity.

From the whole of this argument, thus stated, it will appear, upon what wise and

of the unhappy prince, from the confusion naturally consequent on a declared dissolution; and, on the other, disappointed the unmatured schemes of ambitious and speculative republicans, by immediately shewing it to be their opinion, that the constitution subsisted. They met, and transacted in a manner as near to the ancient customs, as circumstances would admit; then declared a personal abdication of the monarchy, and supplied the defect by placing another on the throne. On this account it is, that the cases here proposed, instead of being called cases of absolute dissolution, are only said to be cases tending to dissolution. So far the history of the Revolution leads, and it carries us no farther. Mr. Locke, in considering the subject as a philosopher and theorist, speaks of such cases, as absolutely dissolving the constitution of government; so as that the question with the people would be on the creation of a new one. But the lawyers of those times did not carry it so far; and the reason, why they did not, was a master-stroke of policy and wisdom.

constitutional

conſtitutional grounds the king may be ſaid to be a corporation by the common law. And it will not be foreign to the queſtion, to purſue the general notion of law concerning the king a little farther, to diſtinguiſh between the two capacities, and to ſhew, in few words, that there is nothing annexed either to his crown or perſon, which may not be explained to have a more immediate or remote reference to the dignity of that relation, which he bears to his people. For though it be obſervable, that his natural capacity imparts ſome peculiarities to his politic, and eſpecially this, that it cauſes the crown to go by deſcent, (which is the caſe of no other corporations, whether conſiſting of many perſons or of one, whether temporal or eccleſiaſtical, who take to them and their ſucceſſors, not their heirs); yet this peculiarity is allowed by reaſon of the politic capacity, and ariſes ultimately from that wiſdom, which, from the earlieſt times, determined ſo many nations to prefer hereditary to elective monarchy.

It is owing to the dignity of the ſame politic capacity, that ſome reſtrictions are laid upon

upon the natural, or ſuch ample privileges annexed to it. Of the firſt ſort, it may ſuffice to mention, that the king cannot be ſeiſed to an uſe; not only becauſe corporations are not enabled for that purpoſe by the ſtatute of uſes, but for a reaſon at common law given by chief juſtice Markham in the year-book * of Edward IV. becauſe he ought not to be joined as a party and truſtee in defence of the eſtate of one ſubject more than of another. If the latter ſort, it is very important, that ſhould the right heir of the crown happen to be an alien, nevertheleſs the deſcent has its free courſe; leſt there be an *interregnum*, which the law will not ſuffer. For this cauſe it is, that the ſafety of the king's perſon is protected with a ſuperlative care. It is high-treaſon to compaſs or imagine his death. This protection is even extended to relations, the queen, and his eldeſt ſon. Acts of parliament reſpecting them are to be taken notice of by judges as public acts, without being pleaded. Hence it is, that his prerogative for acquiring and preſerving his private rights is proper to himſelf, and out of the ordinary courſe of law, in other inſtan-

* 7 Edw. IV. fol. 16.

ces. Notwithſtanding he be only of the half-blood to the king laſt ſeiſed, the crown-lands and jewels deſcend to him. They cannot be diſtributed in coparcenary among females. Where land comes to him by deſcent from a collateral anceſtor, being a ſubject, he inherits it in his natural capacity; but ſhall hold it *jure coronæ* in his politic, and it ſhall attend upon the poſſeſſion of the crown. Purchaſes made by him, after the acceſſion of the regal dignity, veſt in the ſame capacity. He gives and takes only by matter of record; and even during his minority, he may make leaſes and grants, and ſhall be bound by them, for the advantage of his revenue, and to reward merit. His goods and houſhold are entitled to exemptions; and in courts of juſtice he enjoys many privileges, yet ſo, as not to deter the ſubject from contending with him freely.

Now though theſe two capacities cannot be ſeparated in the adminiſtration of the government, yet are they diſtinct in themſelves, and ought to be divided in argument. To ſay then, that the ſtate and people are not conſidered in our law of treaſon, becauſe it is referred

ferred to the king, is either to lay ſuch a weight upon forms of expreſſion, as deſerves no other anſwer than repeating the old obſervation, *Dum proprietatem verborum expendimus, ſenſum veritatis amittimus;* or elſe it is to confound the firſt principles of abſolute and limited monarchy. In abſolute monarchy, (conſidered as a corrupt and deſpotic form of government), the propoſition is true, that treaſon is applied merely to the perſon and adminiſtration of the prince, without reference to his people: and the reaſon is obvious: becauſe, in ſuch a government, his natural powers are co-ordinate with, and the meaſure of his political: will and pleaſure are the only rule of his actions. But in a limited monarchy, like that of England, where both the public and private prerogatives of the crown, applied either to the political capacity, or to the perſon of the king, are inſtituted and exerciſed for the benefit of the people, and to ſupport the dignity of his office, the propoſition is falſe; and to advance it in any manner, is to ſet up a confuſed fantaſtical notion, contrary to the ground of law.

If therefore a ſufficient analogy remain between the law of treaſon in other free ſtates, and the law of treaſon in England, the queſtion naturally occurs, What can be the meaning of treachery againſt the country, or ſtate-treaſons, ſo much talked of by ſome, in contradiſtinction to thoſe marked out by the law of England? It is difficult to find a meaning, except one, of which the conſequences are ſuch, that had N. Bacon * ſeen them, as a conſiſtent republican, he muſt have immediately diſowned it. The free and inquiring ſpirit of this age has led men to ſearch the ancient and forgotten parts of hiſtory for epithets and parallels to miniſters. They have read, how, in one part of Britain, before the act for improving the union, a man might be accuſed of high-treaſon, under a law againſt "impugning the authority of the three e-"ſtates, or procuring any innovation or di-"minution of it." They have read, how the Spencers in Edward the ſecond's time, Mortimer in the reign of Edward the third, the duke of Glouceſter, earl of Arundel, Triſilian, and others, in the reign of Richard the

* P. 108.

ſecond,

ſecond, were convicted of treaſon in parliament, as the record ſets forth, for "ac-"croaching royal power, ſubverting the re-"alm, and fundamental laws;" expreſſions which ſound well in party-papers, as the ſportings of fancy, to exerciſe the ſagacity, and flatter the vanity, of readers; but, when uſed as the adequate deſcription of treaſons in courts of juſtice, become too ſerious, and may be attended with the moſt fatal miſchiefs. Under ſuch general words aroſe all the common law, or ſtate treaſons, conſtructive and arbitrary treaſons; into which every offence, that either was, or ſeemed to be, a breach of allegiance, and the laws, might be raiſed by interpretation and conſequence. Theſe have long been ſtrangers to the kingdom, ever ſince lord Strafford's attainder, and about two hundred years before; and it is to be expected, from the wiſdom and juſtice of parliaments, ever will be. Let theſe be as ſtudiouſly avoided, as the declared ones enforced; and ſurely it would be a very ill exchange in a free government, to diminiſh the forfeiture at the expence of that certainty, which the law has given to the crime. As the penalties, of which ſo much has been

ſaid, are at preſent applied by ſtatute, thoſe, who mean well to their country, and take care to inſpire their poſterity with the ſame good intentions, can ſuſpect no danger to innocence; and they will think it of little moment to ſolicit the approbation of thoſe, who do not. Yet if one might ſuppoſe ſtate treaſons revived, and founded, as they were anciently, on intemperate words, miſdemeanors, and dubious offences, who would engage in public buſineſs, that values repoſe, has wealth to forfeit, and dignities to aggravate his fall? A miſtaken opinion, that he was acting within law, might be the ruin of him; and it would become a regular and neceſſary part of the proceedings, as formerly in Scotland, to argue, in a ſolemn way, the relevancy of the charge, before any evidence was offered of the fact. But it were better to have no law, nor penalties to enforce law, nor the very form of civil ſociety, than to receive only an enſnaring protection from it.

And now it may be urged, that "The pro-
"tection given by ſociety muſt continue to
"be enſnaring, whilſt the law in controver-
"ſy ſubſiſts. Artifice may poſſibly be uſed
"by

" by ill-designing ministers to involve inno-
" cent men in treason, for the sake of con-
" fiscations." If this objection be attended to in all its consequences, the answer to it, one might hope, will be thought as satisfactory as the nature of the thing can admit. For though instances may perhaps be found to warrant the assertion, under goverments cast in another mould, under laws of greater latitude, nay, even in our own history during civil distractions, and times of high prerogative; yet is not the force of it much abated by the different lights in which the crown and the subject have regarded one another, and the equal terms on which they have stood for many years? Is not the law of treason clear, the course of proceeding exquisitely adapted to protect innocence, to intimidate or repel malice? Has not the security against the undue exercise of the prerogative, both in point of rigour and of lenity, been greatly strengthened since the happy Revolution? Are not new advantages given to private men, accused of high treason at the suit of the crown, during trial; and does not access to mercy ly open through the whole proceeding? But when ministers or favourites are impeached

at

at the ſuit of the commons, is not the conſtitution of parliament as ſtrict as it was anciently? or, ſince the act of ſettlement took place, can any pardon be pleaded in bar of an impeachment? Do not annual ſeſſions of parliament, which in reigns immediately preceding the Revolution, were frequently interrupted, afford perpetual opportunities to check all the extravagancies of inferior officers and courts? In a word, Has not juſtice had an uncorrupted courſe in its known and ſtated channels, whilſt thoſe of mercy have been enlarged, and the current has flowed purer, and more freely, than the memorials of paſt ages can boaſt? Shall then ſuch ſuggeſtions be raiſed, after this experience and the reaſonable proſpect, both of the continuance and improvement of theſe bleſſings, if we are juſt to ourſelves, and grateful to heaven?

But let it be ſaid again, (for there is no reaſon to decline the very point of this argument), that the law ought to be aboliſhed, becauſe miniſters may poſſibly abuſe it, who firſt invent plots for their own purpoſes, and afterwards ruin the innocent by falſe charges.

And

And who knows not, that this is the idle whiſper, the ſtale inſinuation of real conſpirators, to delude well-meaning perſons into a belief, that ſuch plots are eaſily forged, and the forgery as eaſily ſupported? Whereas, were the artifice attempted by miniſters in this country, it would be attended with peculiar difficulties, from the nature of the government, beſide thoſe general ones, which the common accidents of life ſuggeſt, ariſing from the ſtubborn genius of truth, and conſtitution of things. Indeed the abuſe is (ſtrictly ſpeaking) poſſible; but do we not govern ourſelves in the tendereſt concerns, and do we not live by probabilities? Reaſon thus on other public points, and ſuppoſe princes, or thoſe entruſted by them, to have the ſmalleſt intereſt in abuſing the exerciſe of power, though it be an intereſt, to the laſt degree, imaginary and ill-underſtood, as in this caſe; and you will wreſt all parts of the adminiſtration from their hands, diſſolve civil policy, and leave each man to govern himſelf, becauſe every kind of political power is accompanied with temptation. Reaſon thus in private conduct, and you muſt hide yourſelf from the eyes of the world; leſt falſhood

may

may blaſt your character, and malice may oppreſs your fortunes. The ſaying is, and it deſerves to be engraven on the hearts of judges, That it is better ten guilty men ſhould eſcape, than one innocent ſuffer: but the ſaying is not, That it is better the ſtrongeſt terrors be neglected to ſecure government againſt its guilty enemies, becauſe a bare poſſibility remains, that they may be unjuſtly held forth to the innocent friends of it. As if it were not the main care of government to provide for its own general ſafety, in which that of good ſubjects is involved: certainly the next care is, to procure ſuch particular ſafeguards for the honeſt, as it can. But when this is done, let every one reflect, that he, who lives in ſociety, is expoſed to innumerable hazards from the workings of envy, revenge, and defamation. Laws can give a very incomplete ſecurity againſt them. On what, then, does he every day rely, and on what can he better rely, than on the ſteadineſs of his prudence, the clearneſs of his heart, the univerſal experience, which decides for the ſafety of innocence, and the order and courſe of providence?

After

After all, it will be aſked, "Suppoſe there "had been no forfeiture by the ancient con- "ſtitution, would it have been thought right "to inſtitute it now?" This queſtion can ſcarcely be anſwered. Who knows what ſanctions may be requiſite for government in ſome periods? As the ancient diſcipline of Rome degenerated, new terrors were expedient on the ſide of law. Yet it is one thing to take off old reſtraints, another to impoſe new. And the concluſion is not juſt, that becauſe the doubt might be conſiderable for reaſons of policy, whether ſuch a ſeverity ſhould be tried in the firſt inſtance; therefore it ought to be abrogated, after the wholſome effects derived from it, and the approbation of ages. There is nothing in the virtue of the preſent times, which claims ſo particular a reſpect. It is obſerved by Ceſar, in his ſpeech againſt putting the Catilinarian conſpirators to death, that thoſe, who ſpoke before him in the debate for ſuperſeding the ordinary forms of law, had caught the attention of the ſenate, by pathetic deſcriptions of ſacrilege, rapine, and the ruin, which muſt have enſued to the commonwealth, had the treaſon been

been effected; to which he oppoſes the danger of deviations from the old and regular method of proceeding. Certain it is, the honeſt ſenators, not intereſted in the fortunate ſucceſs of the conſpiracy, as hiſtory has ſuppoſed him to be, thought that danger of the moſt weight, which he attempted to diminiſh. Ceſar had a difficult part to take, and more art could not have been ſhewn upon the ſubject. But had he lived in this age and country, to defend the abolition of forfeitures, he would modeſtly have owned the difficulty too much for his art, in a caſe where the danger of encouraging traitors concurs with that of removing foundations, to invent arguments againſt ſuch, as ariſe from a regard to that ſupreme law, the ſafety of the people; and to that ancient method of puniſhing, which ſcatters ſalutary terrors round the throne.

Theſe reaſonings may appear to ſome more than ſufficient. Yet, perhaps, others will not be wanting, who may think, that, "by "the dread of this ſeverity, reſiſtance will "be made very difficult; and it is a maxim "of politics, that governments ought to be "calculated with a view to the infirmities of "thoſe

" thoſe, who govern." The maxim is true; but never was extended to prove it neceſſary, that reſiſtance ſhould be eaſy. No form of government can be carried on, unleſs a high degree of confidence be placed in it. Every form is liable to abuſe; but ought not, for that reaſon, to be expoſed to ruin. Religion itſelf, though of the moſt perfect purity in its origin, and not of human inſtitution, has been made a cover to the worſt purpoſes. And yet who ever ſaid, there ſhould be no ſuch thing as religion for a controul to men's actions? Even putting the argument in the ſtrongeſt light, and ſuppoſe the form of government ever ſo unreſtrained, reſiſtance ought to be difficult. If it were not, men might be inflamed by ſlight faults, by perſonal affronts, by private ſufferings, to diſturb their country. And when we conſider, in the beſt cauſe, what confuſion, what violence, what cruelty enſues, it cannot be thought on without horror. Perhaps too it may be fairly ſaid in anſwer to the objection, and the better to ſatisfy thoſe who make it, That in the worſt juncture of affairs, when the conſtitution is affected, when tyrannical deſigns are openly avowed, and ſup-

ported by every injuſtice, the dread of this ſeverity will not create a terror ſufficient to prevent good men from reſiſting: on the contrary, by inſpiring caution, and retarding reſiſtance, till it is become mature, it may facilitate and ſecure the conſequences. A man's fears always bear proportion to his hopes; and one kind of paſſion, or weight of conſiderations, is balanced with another. In good times it is admitted, when men are moved by ambition or reſentment, private and partial affections, they will be deterred from engaging by private conſiderations. But in bad times, when they are moved by a love of liberty, order, and the common good, arguments addreſſed to private fears will not weigh down public affections.

Once more: The beſt anſwer to this objection is ſtill behind, That it proceeds upon notions contrary to common experience, and either deſtructive of law, or inconſiſtent with the nature of it. It proceeds upon a notion contrary to common experience, as it ſuppoſes thoſe, who are entruſted with government, more likely to abuſe their authority in an intolerable manner, than ſome of the particular

lar perſons, who owe it allegiance, to endeavour a change, or a ſubverſion of it. It proceeds upon a notion deſtructive of all ſyſtems of human law, as it ſuppoſes an expediency of weakening thoſe ſtrong ſanctions, which have been employed in every country, to give them their due force and operation. The checks upon government ſhould be of another kind from thoſe deſigned by this objection. Let us keep the balance as even as we can, by forming every eſtate in the conſtitution a controul upon the reſt; but it is extravagant to think of leaving the leaſt ſtrength or temptation to individuals to controul government itſelf. It proceeds likewiſe upon notions inconſiſtent with the nature of law in two reſpects: 1. As it implies an error in theory; that a lawgiver, framing a ſcheme of government, ſhould pay as much attention to the poſſible diſſolution as to the neceſſary ſupport of it; and, inſtead of ſecuring obedience and perpetuity to it, by the ſtrongeſt ſanctions, which wiſdom can deviſe, or juſtice will admit, ought to weaken thoſe ſanctions, for the ſake of caſes which are out of his reach, and muſt be left to themſelves, in which both law and government are diſſol-

ved. 2. As it implies an error in fact; that a law for puniſhment, as that of forfeiture, or a law for indemnity, as one made to aboliſh forfeiture, can operate in times of civil diſorder, as in times of peace, either to give terror or protection. It has in it the firſt of theſe errors, becauſe in ſuppoſing, that the Engliſh legiſlature ought to aboliſh the forfeiture of inheritances for treaſon, it implies, that they muſt provide for caſes of extreme neceſſity and diſſolution, and, as it were, inlarge the right of private judgment concerning thoſe caſes, by taking off the ſtrongeſt checks to private reſiſtance. It has in it the ſecond error conſidered in either light. On the one hand, ſhould this law of forfeiture be preſerved, a juſtifiable and national reſiſtance (ſuch as that at the Revolution) will not be attended with too much difficulty and terror: for when thoſe, who are entruſted with the executive power, have abuſed the deſign, or exceeded the meaſures, of their truſt, there generally follows a weakneſs in the hands of government, which renders it unable to exact the forfeitures originally intended to ſecure it. On the other hand, ſhould the law made to aboliſh forfeiture take place, what

what protection will be derived from the abolition of it in times of civil trouble? *Silent leges inter arma*, was Tully's aphoriſm, ſuggeſted by his own experience, and ſupported by that of all ages. It is true, men might be induced by this abolition to ſhew a greater readineſs to take part, or even to lead, in meaſures of reſiſtance. But in the end it would prove a ſnare to their deſtruction, inſtead of a ſecurity. Will the conquerors in a civil war think themſelves bound by ſuch a law? If one may argue from fact, clearly not. They will inflict theſe, and much greater ſeverities, on the conquered, without regard to the ancient conſtitution of their country, both from policy and revenge. When the troubles of Greece ceaſed, with the ſurrender of Athens, at the concluſion of the Peloponneſian war, the thirty tyrants exerciſed cruelties againſt thoſe who wiſhed ill to their authority, unknown not only to the laws of Athens, but to thoſe laws, which cemented the general union of the ſtates. In Rome, the proſcriptions of Sylla, and the ſecond triumvirate, were contrary to the genius and ancient policy of the commonwealth, though accommodated to the ſituation and intereſt of the lead-

ers. In Florence, the baniſhment and extirpation of entire families, and the confiſcation of their ſubſtance, was a frequent manner of proceeding during the troubles of Italy, ſo excellently deſcribed by Machiavel; to which ſeverity it was owing, that many joined with the duke of Milan, a foreigner, in order to be reſtored to their own country. But it was a proceeding exerciſed in particular inſtances, according as one faction or another prevailed, not derived from a permanent law or policy of that republic, or grounded upon ſtated crimes. Can then any argument be drawn for aboliſhing this law, from the ſecurity, which that abolition may give to private men, in ſuch periods of time; or ought any inference to be made from the accidental ſeverities of civil war, to the equal, and regular, and peaceable adminiſtration of juſtice?

Yet ſtill it may be added, That "if the "forfeiture of inheritances were taken away, "the unfortunate in civil troubles would find "it a favourable circumſtance, to have the "law on their ſide, to interpoſe between the "diſtreſs of their condition, and the fury of "their adverſaries. With that popular and "healing

" healing intention was the ſtatute 11 Hen. " VII. framed, by which the obedience to " a king *de facto*, or in the very words of it, " the prince and ſovereign lord for the time " being, is made lawful." But he, who thinks on this ſubject, will obſerve, that it is one thing to make a law, which encourages a general obedience to government, and another to make a law, which in its conſequences may weaken the bonds of that obedience. Beſides, the circumſtances of Henry the ſeventh's family and reign required the one; the circumſtances of this royal family and time by no means allow the other. Let it be ſuppoſed, however, that the time would bear it; yet the reaſoning juſt uſed, to ſhew how little protection would be derived in civil troubles from the abolition of this forfeiture, will receive great confirmation from conſidering what have been the conſtruction and effect of the famous law of Henry the ſeventh. The natural conſtruction ſhould ſeem to be that, which is moſt for the benefit of the people, to heal and compoſe civil differences. And it is the ſettled rule, that laws made for the attainment of ſuch public ends ſhall be expounded in the largeſt ſenſe; and though

though the words are ſhort and imperfect, yet they ſhall be extended ſo, as not to be illuſory and vain. Under this rule an equity has frequently been admitted in ſtatute laws againſt the latter. Now the general intention of that law is plainly to indemnify the ſubject, who ſhould not only ſubmit to an uſurped authority *de facto*, but ſhould be active in ſupporting it. The words of it ſuppoſe a kingly government, and are applied to the allegiance and ſervice, which ſhall be paid to the prince upon the throne. The reaſon of which was, that none of the ancient contentions had ever ended in the republican form of government, and the law was accommodated only to the experience of paſt times. But the miſchief might ſubſiſt in caſes not expreſſed in the words, and the remedy might, in the reaſonable methods of conſtruction, be made adequate to the miſchief. It is remarkable, however, that, in the ſingle caſe which has happened ſince the making of that law, in which the ſubject could apply it to his benefit, it has received a ſtrict conſtruction. For, after the reſtoration, many, who were called to account for ſubmitting to the uſurped authority, inſiſted upon the equity of the

the ſtatute; but it was denied them; and they were told, 1. That the ſtatute ſuppoſed a monarchy to be the medium of the executive power, and provided only for a king *de facto*. 2. That though the authority *de facto* ſubſiſted, and was ſubmitted to for a time, yet it was uſurped wrongfully by a party, and every thing done under it was void in law; the very queſtion, which that law of Henry the ſeventh was intended to preclude. Indeed the act of indemnity, after the reſtoration, proceeds on the ſuppoſition of illegality in the proceedings of the late times, not only as to the high courts of juſtice, but in every part of the government; and leaves thoſe, who are excepted, to be proſecuted as traitors at law. This is a declaration in parliament, which ſeems to prevent the equitable conſtruction of the law of Henry VII. and evinces, in a great meaſure, what is here advanced, that from the nature of civil commotions theſe acts of the legiſlature will always prove a very weak ſupport to thoſe, who lean upon them: queſtions of law will be blended with queſtions of ſtate, and both be governed by reaſons of temporary convenience. The wiſe hiſtorian of Henry the ſeventh's reign

reign was ſo ſenſible of this, that, ſpeaking of the ſtatute concerning a *de facto* king, he intimates, that it was not likely to laſt, but made to ſatisfy for a time; and calls it "a "law of a ſtrange nature, more juſt than "legal, and more magnanimous than provi- "dent." Words very applicable to ſuch an alteration of the conſtitution, as theſe objectors demand.

This important ſubject has now, in ſome manner, been viewed in all its parts. The firſt endeavour was to clear it of circumſtances, which do not belong to it in England; and from which have ariſen the general cenſures upon it, to be found in the celebrated hiſtories of civil wars, and the writers on liberty. The foundations of reaſon, on which this part of the conſtitution is eſtabliſhed, have been expoſed to view; natural right ſeparated from civil right; and the latter ſhewn to be alone concerned in the creation, and conſequently in the forfeiture of inheritances. The general policy of law has been illuſtrated from free ſtates, as the power of inflicting this penalty is moſt ſtrongly binding on human nature: the particular policy of government

vernment has been marked out as diſtinct from policy of law, in reſpect to the manner and circumſtances attending, and the effects ariſing from the adminiſtration of this power.

To conclude: ſuch a terror againſt treaſon was peculiarly adapted to thoſe ages, in which it has either been introduced or enforced. It was fitted of old to the genius of this brave people, who, deſpiſing their own lives, were only to be moved by a generous regard to their poſterity. It is fitted to the genius of theſe times, when perſons are to be touched in that deareſt part, themſelves and their families; and the love of our country is held a weakneſs, and miſtaken principle of action. Men will be made averſe to deſperate engagments, by a tenderneſs, which, whether derived from inſtinct, vanity, or virtue, is of equal moment. They pretend to be againſt the continuance of this terror from the ſame tenderneſs; not aware, that to confeſs the power of the affection, is to vindicate the wiſdom of the law. But, to ſpeak plainly, reaſon has marked out the due office of this affection, as of all others. When

ſeparated

ſeparated from the purſuit of public good, nothing can be more falſe and dangerous; when united with it, nothing more juſt and beneficial. Nay, the fulleſt, as well as trueſt, indulgence of the affection ariſes from this union. The honour of a family is leſs obſcured by the puniſhment than the crime; and whoever regards his own fame, and their laſting intereſt, will beſt provide for both, in laying every check on the malignant and deceitful paſſions, which produce the crime, and in aſſiſting to maintain, by the moſt affecting ſanctions, the tranquillity and ſafety of his native country. Nor let it be called court-adulation and cowardice to ſecure theſe extenſive benefits. What is flattery, and what is cowardice, but either artfully to indulge, or tamely ſubmit to, the paſſions and humours of men, againſt reaſon, and the dignity of human nature? But, if that be flattery in public conduct, which can bear a rational examination upon principles of liberty, ſtrengthens the old foundations, ſupports the legal awe and authority of government, every wiſe and honeſt man would be placed in the rank of ſuch paraſites. Could one of this turn of mind pry into the depths of futurity

turity, and ſee any of his degenerate family entertaining traiterous deſigns, his grief would be conſiderable, but his indignation would be greater. He would grieve to ſee the fruits of his induſtry ſacrificed to the ambition of one; but he would call to mind, that as they were acquired, enjoyed, tranſmitted, by the protection and favour of ſociety, they were due to the public ſafety, when abuſed to the deſtruction of it. He muſt receive pleaſure from reflecting, that the law of his country would ſo far regard his honour, as not to own the traitor's deſcent from him; and though he would compaſſionate an innocent poſterity, yet knowing the law to have the reſources of clemency, as well as the ſeverities of juſtice, he would hope, that theſe might merit reſtitution by their temper and innocence; or, at leaſt, run the race of their anceſtors, and gain new riches and honours by the ſame virtues.

Inſtances there are in hiſtory, in which nations, jealous of their privileges, have conſented by new penalties ſuited to an occaſion, and more ſtrongly enforced, than any, which the law of England furniſhes, to ſecure the

vernment eſtabliſhed. Henry the third of France, a prince of the mildeſt nature, as Davila and Mezeray informs us, in a full and free convention of the ſtates at Blois, being much preſſed by the league *, enacted the ſevereſt laws againſt treaſon. It is true, thoſe laws did not ſave him; but he owed his perſonal ruin to qualities from which no human means can ſave any man; to his own ill judgment and baſeneſs, and to the ſtrange enthuſiaſm of the bigot, who by ſurpriſe aſſaſſinated him. Beſides, in reſpect of his cauſe and family, thoſe laws could have little or no effect, being untimely made, not to prevent a miſchief only foreſeen, or riſing at a diſtance, but to remedy one that was inſtant, and grown too ſtrong already; and to deter a party, whoſe chief was almoſt equal with the king himſelf, and which was ſupported by a conſiderable body of the people, intent to preſerve the ſucceſſion to the crown in princes of the national religion. Yet, be this as it will, if the inſtances of this kind are not rare, and ſometimes have proved ſucceſsful, the rather ought we to confirm an-

* *Briſſon Code d'Henry* III. l. 8.

cient

cient and conſtitutional terrors, for the prevention of a miſchief, which can only become formidable from a careleſs contempt of it, and to ſet them on the ſide of that eſtabliſhment, which is fixed on the principles of the conſtitution itſelf, and which has ſo often employed in its defence the wiſdom of parliament, the affections, the wealth, and valour of the whole nation. Moſt of the civil troubles, which have filled the annals of our kings with ſo many leſſons of warning, took their riſe from the diſunion of the nobles, whoſe private attachments led them to follow different ſtandards, while the expectation of the people, being equal from both parties, inclined them to wiſh for repoſe under ſome one family, rather than the victory of either. But where the experience, as well as the expectation, is unequal, where the genius of a family has been for generations repugnant to that of the people, where this natural repugnance has been heightened by the policy of arbitrary courts, the ſervility of foreign nations, the protection of determined enemies; by the baſeſt maxims of ſuperſtition, diſpenſing with the obligations, or eluding the ſanctions of true religion; who cannot but ap-

plaud ſuch means of giving vigour to the law, that it may prove a defence proportioned to the greatneſs of our enjoyments? We have a religion to loſe, founded on principles of purity, of freedom, and mercy: we have a conſtitution of government, the beſt formed to convey peace and happineſs to mankind: we have honour to loſe, of which the monuments of former ages ſhew, that as large a patrimony as any country can boaſt is deſcended from our anceſtors. Theſe are conſiderations, which cannot but affect good men to the heart: they eſpecially concern ſuch as are called to the public ſervice in parliament. A brave ſoldier would be covered with confuſion, to deſert the poſt aſſigned him by his general in a day of battle: ſo every one of theſe is equally incapable to deſert that ſtation, in which the choice of the crown or the people has placed him, a guardian of the public liberty. And as he would appear in the field, if the neceſſity of the times required it, againſt traitors, who ſhould invade theſe invaluable rights, he is animated by the ſame zeal, to lend his voice and his power to arm the law with that terror, which may prevent the dangerous neceſſity.

——*Nova*

———*Nova bella moventes*
Ad pœnam pulchra pro libertate vocabit.
Virg.

Let it be remembered further, that this zeal for liberty, which oppoſes itſelf to the lovers of tyranny or licentiouſneſs, inſpires a due regard to the rational aſſertors of it. And have not the defenders of Revolution principles, and the Proteſtant ſucceſſion, a juſt claim to ſo important a ſecurity againſt any, who, in a future time, ſhall attempt to eradicate and deſtroy either?

But theſe conſiderations ſhould particularly weigh with us, when a foreign power has made a ſtrong, though vain, effort, even previous to a declaration of war, in contempt of the moſt ſacred leagues, to ſhake the firm allegiance of the ſubject, to alter the government of this kingdom, and to gratify a ſhameleſs perfidy, and a ruinous ambition *. If the fleets and armies of that power are ſent out with a pretence of ſupporting allies

* This diſcourſe was written a few months after the alarm of a deſigned invaſion from France in 1743.

and friends, it means only to extend and aggrandize itſelf. Examples of other countries too clearly ſhew, that they, who court and rely upon this friendſhip, nouriſh a ſtrength, which will prove one day their deſtruction. Vainly they flatter themſelves, to confine their conſequences to their enemies. When once the torrent paſſes its proper bounds, thoſe, who have given it vent, are the firſt to be borne away in the rapidity of its courſe. The glories of the French monarchy have never been built upon the juſtice or moderation of its princes; and, when they have given aſſiſtance to a neighbour nation with generous profeſſions, their deſign has uniformly been to ſubvert the natural manners and independence of that nation. The people of England have expreſſed their ſenſe of this truth: the parliament have ſeconded their indignation by a ſalutary law. In the mean time it is not to be doubted, that the attempts of enemies, who hate our good faith, and envy the ſources of our ſtrength, may raiſe a ſpirit of watchfulneſs both in the prince and people: and as, on the one hand, they will engage the royal family on the throne to think their ſecurity depends on a lenity,

wiſdom,

wiſdom, integrity of government; ſo, on the other, they will engage the nation to a temper of calmneſs and loyalty, and induce every private man to reflect, that the love of our country comprehends and ennobles all the private relations and partialities of life; and whatever tends moſt effectually to perpetuate the laws of it, tends, at the ſame time, to perpetuate his own name, wealth, honours, and poſterity.

APPEN-

APPENDIX.

October 15. 1745.

THE writer of the foregoing eſſay, in conſidering the argument of it, both as a general queſtion of law, and with a particular view to the law of England, has made it his endeavour to obviate every objection, which either the obſervation of others, or his own reaſon and invention could ſuggeſt to him. Yet he is ſenſible, that one difficulty remains unſatisfied, which may not be improperly introduced from a paſſage in the book itſelf; where it is ſaid *, " That our " law varies from the feudal policy, to which " it owes its origin; becauſe, by the former, " all forfeitable lands are alienable at the " pleaſure of the party in other ways than

* P. 85.

" by

" by forfeiture; whereas, in the latter, they " were forfeited, though not alienable or " chargable, in any way by the ſole will and " power of the tenant, and merely deſcen- " dible to his next heir upon his death." Now it may be added, " If this peculiarity " be an advantage, which the law of Eng- " land has over the feudal law, it may be " complained of alſo, as an advantage, " which it maintains unduly over the law of " Scotland: and the rather, after proviſion " had been made at the Revolution to reme- " dy the inconſiſtency, and limit the forfei- " ture of inheritances within its juſt bounds. " In our law, the tenant in tail can aliene by " conſent, and upon that reaſon was made " ſubject to forfeiture by crime. In that of " Scotland, the tenant, under a ſtrict tail- " zie, cannot aliene, and yet is ſubject to " forfeiture. By the act of the ſeventh of " queen Anne, the right of the crown to " ſuch forfeiture, which had been releaſed in " 1690, was again revived, to laſt till the " pretender's death, and then was to be ex- " tinguiſhed for ever. To ſuſpend the ex- " pectation of that bleſſing longer, by enact- " ing the forfeiture to continue till after the

" death

" death of his ſons, is manifeſtly unjuſt, and " contrary to the terms on which it was ſuſ- " pended at that time."

In this eſſay it has been laboured, with great care, to ſhew, on what a variety of juſt, ſocial, and comprehenſive principles, both the creation and forfeiture of inheritances ſtand. And therefore, though it be true, that the reaſon of forfeiting eſtates tail in England is ſaid to be derived from the tenant's power to aliene; yet it ſhould be conſidered, that this reaſon is only one, and that perhaps the leaſt weighty, ſelected from many others, which ſupport it. The main principle, in which all the points of this argument centre, is this, that every right conferred by civil law, is juſtly limited by that law, according to the genius, conſent, and policy of different ſtates. So that if the leſſer principle, which may perhaps be thought to come cloſer to the ſtrict natural juſtice of the caſe, cannot be applied, by reaſon of general convenience, the greater is at hand, which comprehends and decides it. In the argument of a famous * caſe in the exchequer-chamber, it

* Hob. Rep. 334. Sheffield v. Radcliffe.

was

was intimated by one of the beſt lawyers of any age, Lord Hobart, that it was not a neceſſary or foreſeen conſtruction of the ſtatute *de Donis*, to exempt theſe eſtates-tail, deſcribed in it, from forfeiture; ſince even after the ſtatute, they were, in effect, the ſame as fee-ſimples conditional, which, on iſſue had, were before liable to be affected by the treaſon of the tenant. It was therefore plainly his opinion, that the forfeiture of them might be vindicated from other general reaſons of juſtice and civil prudence. One cannot, however, help acknowledging, that the equitable and admired maxim, "No eſtate "ought to be forfeited by crime, which can-"not be alienated by conſent," ſeeming to be received in England, furniſhes an evidence of the exactneſs, with which our law holds the ſcales in the buſineſs of forfeiture: and how ſtudiouſly it preſerves the grace of ſyſtem and analogy. But it muſt at the ſame time be acknowledged, that this maxim receives its weight from being grounded on another maxim; "That no eſtate ought to be "reſtrained from a complete power of alie-"nation by conſent." And in whatever law this laſt maxim is received, the firſt will be obſerved

obſerved of courſe. Therefore if one attends to the law of Scotland, it will probably appear, that the want of adhering to the firſt maxims, ſo far as caſes of forfeiture ſubſiſt, which cannot be reconciled with it, is owing to the neglect of the other maxim, without which the firſt may produce the greateſt danger and inconvenience.

To treat the ſubject with clearneſs and brevity, it will be material to ſet forth,

I. The general nature of eſtates-tailzie, and the hiſtory of exempting thoſe of the ſtricteſt kind, from forfeiture for treaſon.

II. How far that forfeiture was revived by the operation of the general enacting words in the ſtatute 7 *Annæ*, *c.* 21. That, " from " and after the firſt day of July 1709, all " perſons convicted or attainted of high- " treaſon, or miſpriſion of high-treaſon, in " Scotland, ſhall be ſubject and liable to the " ſame corruption of blood, pains, penalties, " and forfeitures, as perſons convicted or " attainted, *&c.* in England."

I. As

1. As to the origin and nature of eſtates-tail in Scotland, it is ſaid, by the authors, who have written upon them, that they are derived from England, and in the nature of ſubſtitutions, or *fidei commiſſa*, in the civil law, and *feuda gentilitia*, in the feudal law. The celebrated Craig ſpeaks of them as receiving a ſtrict interpretation, being injurious to the courſe of feudal deſcents, the ancient fruits of tenure, and rights of the crown. The firſt deſign of them was to perpetuate eſtates in the male line, excluding the heirs general, by which the lords and king loſt the wardſhip and marriage of females. But they were ſubject to forfeiture; and members of the entail were apt to create charges, and even alienate without a remedy provided for the next ſubſtitute or heir of tailzie. To prevent ſuch charges and alienations, prohibitive clauſes (conceived in general words, and without any penalty annexed) were added to entails; and yet they were for a long time ſo entirely new to the genius and principles of the municipal law of Scotland, that * Craig (who wrote in the year 1600) takes no no-

* V. *de Feudis*, *c.* 16. *l.* 2. *de Tallia.*

tice of any other reſtraint on alienation, than the old feudal one of aſking the Superior's conſent: and it might well admit of ſome doubt, whether thoſe clauſes would be allowed as legal, and whether any or what relief could be given to the heir in virtue of them. In reſpect of creditors for a valuable conſideration, the 18th act paſſed in the parliament of 1621, againſt the fraudulent diſpoſitions of bankrupts, had rendered them of no avail; and, by conſequence, had placed them in an unfavourable light. The judges, however, at laſt, made ſome efforts towards relieving the heir; and, by conſtruction of that very act, conſidered him as a creditor under the prohibitive clauſe of the ſettlement, but only againſt the voluntary and gratuitous deeds of his predeceſſor: the land was ſtill liable to contracts of lawful debt, agreeably to the poſitive words of that act, which had been thus conſtructively taken to the heir's benefit. When the judges had proceeded ſo far in ſupport of theſe ſettlements, it is eaſy to imagine, that the makers of them would contrive means of extending that ſupport much farther, and of obtaining, by the expreſs proviſion of the party, what the mere

operation

operation of law could not effectuate. To this intent, the clauſes irritant and reſolutive were inſerted; one, to make void all charges and executions on the land, that the creditor might receive no benefit from his contract; the other, to extinguiſh the right and title of that member of the entail, (who ſhould ſubject the land to debt), and of all who claim under him. Thus the conditions of the ſettlement were enforced at the peril of the ſeveveral intereſts of thoſe, who ſhould be concerned in breaking them.

Lord Stair *, (who was preſident of the ſeſſion ſoon after the reſtoration), in his inſtitutes of the law of Scotland, intimates, that ſuch clauſes did not become very ordinary earlier than his own time; and gives it as his opinion, that "they do not well quadrate "with the right of property;" for which cauſe, he ſays, (ſpeaking of the ſtate of them, when he writes), "they are ſeldom put upon "heirs of lines, heirs male, or heirs of pro-"viſion, by contracts of marriage, as being

* Stair's Inſt. 1 b. tit. 14. 4 b. tit. 18.

" heirs of blood." He obſerves *, that " in " England theſe eſtates were made void by " a diſſembled proceeding of fine and reco- " very; and by warrants to ſell, purchaſed " in parliament, which paſs without much " difficulty. If they become frequent with " us, it is likely we ſhall find the ſame reme- " dy." And he adds, " Albeit clauſes irri- " tant in tailzies be not penal, yet becauſe " they are againſt the common law, and " therefore odious they ſhould not take ef- " fect, before they be declared in a judicial " courſe." To the reaſons here laid down, it muſt be owing, that theſe clauſes are not expounded the moſt liberally in ſupport of the deſign of the maker: for if one of them is by negligence omitted in a ſettlement, and one ſtands alone, though the maker intended both; yet they are never ſuppoſed, when they come in judgment, to imply one another. A clauſe irritant will annul debts contracted, but not the right, which the debtor has to the land; in which caſe, the creditor is the only ſufferer: and a clauſe reſolutive will make void the right of the debtor, but not

* Inſt. 2 b. tit. 3.

the

the debts contracted; in which caſe, the debtor is the only ſufferer. After ſome experience, theſe clauſes were found to tend greatly to the injury of creditors, and the good faith of commerce, ſo as to evade the plain meaning of the act of 1621, as well as inconſiſtent with the nature of property and dominion. Such inconveniencies were more eſpecially apprehended upon the determination of the remarkable caſe of lord Stormont in 1662, in which irritant and reſolutive clauſes were adjudged effectual in reſpect of all creditors whatever. Another act of parliament, therefore, was thought neceſſary, to reſtrain their operation, and to ſecure creditors and purchaſers, who contracted *bonâ fide*, and without notice; that is, were not aware of the limitations and conditions annexed to the eſtate. This was done in the year 1685, by a declaratory * law concerning them. In the ſame act, occaſion was taken, for the firſt time, to give a parliamentary ſanction to the tailzies ſo limited. But during all this time, however the ordinary rights of alienation might be reſtrained, or taken away, the right of the crown to the

* V. act 22. 1685. Scots acts of parl. v. III. p. 35.

forfeiture of theſe tailzies upon offences, which legally incurred it, was never called in queſtion; and that law reſerves and declares it, by expreſs words.

At the Revolution, the forfeiture in prejudice, not only of creditors and vaſſals, but of heirs of entail, was declared to be a great grievance, by the convention of eſtates in Scotland. Nor was the argument, which now ſeemed to be drawn for defeating this penalty, or alienation by forfeiture, in treaſon, from the effect of the reſtrictive clauſes in tailzies, to defeat the ordinary kinds of alienation, any reaſon or argument for declaring it ſo. For ſurely it could never be thought right, or conſiſtent in reaſon, (if ſome ſtrange abuſes of the power of inflicting this penalty, recent at that time, had not demanded it), to add by act of parliament (as was done in 1690) a new and more extended operation to thoſe clauſes, not warranted by the rules of conſtruing them, or the ancient policy of the kingdom, merely to ſave tailzies from forfeiture; when the parliament had been ſo jealous of them five years before, as to reſtrain them, for the ſake of public policy,

policy, in reſpect of creditors and commerce, even againſt their natural and judicially-allowed operation. The truth is, that the hiſtory of the times, and the claim of rights made by that kingdom, will unfold the ſole cauſe, why the forfeiture, at leaſt in reſpect of the heir, was conſidered as a grievance. Confiſcations* were promiſed before conviction or proceſs; perſons impriſoned without a reaſon given; forced to depoſe againſt themſelves in capital crimes; purſued and forfeited upon ſtretches of obſolete laws, frivolous pretences, and defective proofs. Judges were influenced by commands contrary to law, and turned out of their offices for diſobedience, inconſiſtently with ancient uſage, and their neceſſary independence: opinions given by the lords of ſeſſion, that to conceal the aſking of relief for one forfeited, and the refuſing to diſcover private judgments in relation to other men's actions, are points of treaſon. It is not to be wondered, when the crime was to ſuch an high degree precarious, the method of proceeding ſo arbitrary and unjuſt,

* Acts of Sc. parl. vol. III. p. 147—155. *See the declaration of Eſt. containing the claim of rights*, &c.—*The articles of grievance repreſented*, &c.

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the examples of thoſe, who ſuffered, recent and numerous, that a puniſhment, which is the terror and ſevereſt ſcourge of bad men, ſhould become formidable, as well as odious, to good men. The attainder of the earl of Argyle in 1685, is particularly taken notice of in the claim of rights, as a reproach to the juſtice of the nation. One clauſe in it, declaring him, and thoſe who had joined with him, incapable of mercy, and ſuch as ſhould interpoſe for their reſtoration, guilty of treaſon, was ſo much beyond the example of former times, that it was repealed in the following year, by the very parliament, which attainted him. In 1689, as ſoon as the convention of eſtates had been declared a parliament, and the new government was eſtabliſhed, his attainder was entirely reverſed; and the preamble to the act of reverſal recites that part of the claim of rights, which was applicable to the proceedings in his caſe. The reverſal of Andrew Fletcher of Saltoun's attainder, and the reverſal of Sir Patrick Hume's attainder, in 1690, recite the ſame in the ſtrongeſt terms; and add, that all ſuch forfeitures are to be conſidered, and the injured parties redreſſed. The former had

had been condemned on the depoſition of a ſingle witneſs, under the terror of death, and temptation of pardon, as ſtanding charged with, and priſoner for, the alledged crimes. This is a general view of the facts, upon which the declaration in the claim of rights was founded. And that ſuch oppreſſion might be prevented for the future, * in theſe two ſeſſions of parliament, two different acts were made in favour of vaſſals, creditors, and heirs of entail, of perſons forfeited. By the latter of thoſe laws, (the act of 1690), the right of the crown to the confiſcation of eſtates-tail was limited, and, in a great meaſure, releaſed; and "the heir prejudged, only in ſo far, "as the party forfeiting had right to contract "debt, or affect the land, or others, by qua-"lity of the right and infeoffment, and had "not exerciſed his right."

Now it will not be improper to obſerve, that the preamble to the act of 1690, which releaſes the royal right, inſtead of grounding itſelf on the facts juſt mentioned, ſeems to carry the thing too far, and to proceed upon reaſons of another kind than were expreſſed

* Act 33. 1689. Act 33. 1690.

two

two years before, in the claim of rights; or even in that very year, in the reverſal of the earl of Argyle's, Andrew Fletcher's, and Sir Patrick Hume's attainders. No principle is more juſt and amiable, than what is laid down in that preamble, that "every man ſhould "ſuffer for his own crime:" yet how to prevent (agreeably to what is ſaid immediately after) "the innocent from being involved," in a great meaſure, and under ſome circumſtances, "with the guilty," is a very hard problem in politics, and human life: for, in many caſes, the nature of things inſeparably blends their intereſt. And in all where they are blended by policy of law, and civil ſociety, natural equity interpoſes leſs in favour of the heir, than of any other. Let that equity be applied to creditors and vaſſals, perſons who have paid a valuable conſideration for their intereſt, it not only ought to be maintained to the utmoſt, but is in no ſort impeached by the law made, ſubſequent to the union. But it carries not equal weight, when applied to heirs of entail, whoſe intereſt was gratuitouſly conferred; is ſubject, in many caſes, to be extinguiſhed or diminiſhed by voluntary alienations, or charges of the immediate

mediate poſſeſſor; and, receiving its allowance from the law, as well as its exiſtence from the maker of the tailzie, may, in all caſes, reaſonably ſtand ſubject to be reſcinded by contraventions of law, as well as of the ſettlement. Another thing laid down in the preamble, as a ground of that act, is, the principle already mentioned, "that nothing "ought to be forfeited by crime, which can-"not be alienated by conſent." And this is not ſo much a new and different principle, as a branch of the former, or a concluſion deduced from it. It is in itſelf, and taken abſolutely, a rational and juſt concluſion; but when made the meaſure of judging on this queſtion, as it concerns the ſtrict tailzies, may be fairly ſhewn to be attended with danger; and, if purſued to its extent, inſtead of placing the two parts of this united country upon equal ground, will confer a kind of privilege, or exemption, upon one, for the benefit of neither. This will be conſidered more properly under the ſecond head of argument, when the revival of the common law of Scotland, as to theſe tailzies, ſhall be vindicated. Let it ſuffice to ſay here, that, upon the whole, this preamble ſcarce appears

to

to have been framed and conſidered, as the prefaces to laws ought to be: it aims to draw arguments for releaſing the right of forfeiture from vague, indiſtinct, and general maxims; and not from that particular experience, which ſhould be the inducement to every law, and which was the only cauſe of declaring that right a grievance. Beſides, the true remedy for the grievance did not ly in adviſing the crown to releaſe the right of forfeiture, but in taking away that deſcription of the crime of treaſon, and thoſe methods of proceeding, which had been made the inſtruments of applying it to purpoſes of oppreſſion. And this may be ſaid under the ſanction of great authority, ſince the parliament of Great Britain ſeemed to conſider the matter in this light, when, without liſtening to the general maxims of reaſon cited from the preamble of the act of 1690, they applied themſelves to alter the crime and proceſs of treaſon in Scotland; to regulate the adminiſtration of juſtice in ſtate-crimes, upon principles much ſafer for the ſubject, than were known there before; and ſo thought, that all probable danger of reviving the grievance

vance was removed by that very ſtatute, which reſtored the right.

II. The next queſtion is, How far the general words of the act for improving the union, paſſed 7 *Annæ*, operate, to revive this kind of forfeiture? The conſideration of which will preſent to view,

1. In what caſes eſtates-tailzie are ſaved from forfeiture, notwithſtanding the general words.

2. What caſes of forfeiture, ariſing from ſuch eſtates, coincide with the principle of confiſcating, by crime, that property which may be alienated by conſent; and, not having been taken away by the act of 1690, ſubſiſt ſtill by the common law of Scotland, without receiving any operation from the ſame general words.

3. What caſes of tailzies are laid open by thoſe words, to forfeiture; and do not coincide with, nor are governed by, that principle.

1. Every caſe, which the law of England favours, and exempts from forfeiture, is ſaved in the law of Scotland. Tailzies, made in conſideration of marriage, or upon any other conſideration, are not affected by the forfeiture of a traitor, who is expreſly deſcribed in them as only tenant for life, and has none of the powers incident to the property of the fee; ſeveral of which the tenants in tail ſtill enjoy, ſo as to make their eſtates conſidered juſtly in law, as eſtates of inheritance, though they are tied up in many points, by the ſtrict clauſes, in their reſpective ſettlement. Again, where there are any ſubſtitutions or remainders in a ſettlement, theſe are not affected by the forfeiture of the tenant in tail in poſſeſſion, agreeably to the proviſo in the ſtatute 33 Hen. VIII. and it has been uſual for the grantee of the forfeiture, to purchaſe out the intereſt of the ſubſtitutes or remainder-men; though by many particular acts of parliament paſſed upon extraordinary occaſions, a day has been given to them, againſt which they were to come in, and make their claim; otherwiſe their right and intereſt were to be totally extinguiſhed. In this inſtance, by making

making the law of England the rule of forfeiture in Scotland, the effect of the act of 1690, is ſtill preſerved to the ſubſtitutes or remainder-men: for at the common-law, before that act, the forfeiture of the tenant in poſſeſſion was the deſtruction of the whole ſettlement. Laſtly, where any man was ſeiſed of an eſtate-tailzie, affected with prohibitive, irritant, and reſolutive clauſes, and was married before the act of the ſeventh of queen Anne took place, iſſue being had, or poſſibility of iſſue remaining, he was ſecured in like manner. This caſe was conſidered in a particular proviſo of the act, out of tenderneſs to ſuch, as had actually contracted in marriage at that time, in confidence, that ſettlements ſo eſtabliſhed would, in reſpect of the iſſue of the marriage, be exempt from forfeiture, though not intended to be favoured, in reſpect of any, who, being ſeiſed under theſe ſtrict ſettlements, ſhould marry, after warning given by parliament, that the condition of forfeiture was annexed to them, for the future, by conſtruction of law.

2. As to the caſes, which ſubſiſt by the common law of Scotland, (without having been varied at any time by ſtatutes), and coincide with the principle ſo often mentioned, they may be ſtated in this manner. Where the maker of a tailzie, upon onerous cauſes, or a valuable conſideration, reſerves an expreſs power to alter or innovate during his life, by acts, which he does not ſpecify to be perſonally exerciſed by himſelf, and afterwards commits treaſon, he may be conſtrued to forfeit. This is agreeable to determinations in England *, that where the condition of revocation in a ſettlement, either in reſpect of tender or deed, is not ſo perſonal, but that another may perform it, there the crown may exerciſe the power of revoking, upon a legal forfeiture. Where the maker of a tailzie, not depending on any onerous preceding cauſe, is inclined to revoke it, though he has not expreſly reſerved a power for that purpoſe; yet it is implied in the ſettlement, as being *donatio mortis cauſâ*, and in the nature of a teſtament, which, till the death of the party, is ambulatory, and a revocable act.

* Hale's H. Pl. C. vol. I. p. 246.

Here,

Here, likewiſe, the principle does not interpoſe to prevent the forfeiture. Where tailzies carry a ſimple deſtination of ſucceſſion, they may be expoſed to forfeiture, conſiſtently with this principle; becauſe thoſe ſettlements provide only a particular line of ſucceſſion, varying from the legal one; and leave a power to the maker, or reſpective members, as they ſucceed, to alter them. Where tailzies are created with prohibitive clauſes, or *pacta de non alienando*, there can be no ground of complaint, if they are expoſed in like manner. For thoſe clauſes operate no further, than to prevent voluntary and gratuitous diſpoſitions of the land: it is nevertheleſs ſubject to the poſſeſſor's debts, and may be diſpoſed of for a valuable conſideration. Where tailzies are made in the ſtricteſt manner, if a power of raiſing a ſum of money, or affecting the land by debt, to a particular value, be reſerved to the member of the ſettlement in poſſeſſion, the heir may be prejudiced by the forfeiture of the poſſeſſor, ſo far as that power extends, agreeably to the operation of the principle, and within the intention of the act of 1690.

3. It muſt now be acknowledged, that there is a caſe taken away by the act of 1690, and revived by the ſtatute of the 7th of the queen, which can hardly be reconciled with this principle; in which an heir of tailzie, taking right of ſucceſſion by a ſettlement, having in it clauſes irritant and reſolutive, as well as prohibitive, may forfeit on the commiſſion of treaſon, not only for himſelf, but for the heirs of his body; though the law has not given him a legal method of conveyance, by which he can bar the right belonging to his own iſſue, under the ſettlement. But though the law has not expreſly provided ſuch a method, yet it has left one open in conſequence of the act of 1685, concerning tailzies. By that act, if the proviſions and clauſes, irritant and reſolutive, are not repeated in the return of the inqueſt, and in all the inſtruments of ſeiſin and conveyances, (which are neceſſary in Scotland, to put the heirs of tailzie in poſſeſſion), the omiſſion ſhall import a contravention againſt the perſon, who omitted to inſert them, but not againſt creditors *bona fide:* and thus an heir, who reſolves to break the tailzie, may take

take advantage to ſell, from the omiſſion of theſe clauſes; in which caſe, he will get his price, the buyer be ſecure, and the next heir of tailzie be defeated. Had this been foreſeen, when that law was made, it would have been prevented: but, whilſt the poſſibility of it ſubſiſts, it ſoftens the hardſhip, and affords, in ſome degree, a plea for the forfeiture, even upon the principle of alienation by conſent. For the law, being a ſtranger to thoſe refined notions of honour, which diſtract ſome minds, will not preſume, that he would ſcorn to alienate the eſtate of his family by fraud, who expoſes it to forfeiture for treaſon committed in violation of his allegiance, and ſolemn oaths.

Admitting, however, that this caſe does not purſue the principle inſiſted on, it ſhall now be argued, (with all reſpect to the memory of that parliament, who framed the act of 1690), that the caſe ought not to purſue it. For it leads to conſequences widely different, in the laws of England and Scotland; and though, when applied to both, it ſounds the ſame thing in words, it is by no means the ſame in reality. In order to prove this,

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it will be important, to ſtate the general notions of law in the two countries, as to the power allowed over inheritances. The ancient feudal policy was very ſtrict upon this ſubject, and gave the tenant in fee no other privileges, than ſuch as aroſe from his poſſeſſion of the immediate profits and improvements of the eſtate. The courſe of ſucceſſion was uniform; and every man, who claimed under a feudal gift made to one and his heirs, was to derive his deſcent from the blood of the firſt feudatary or purchaſer. So that when once the gift had been made by the king, or lord, the law ſeemed to take the future primary direction of it into its own hands. By degrees, the ſtrictneſs of this policy wore out in England, and the law, in a courſe of ages, has adopted new principles, and allowed ſuch a latitude of alienation to the tenant in fee, that at preſent it ſeems only to act a ſecondary part, either to come in aid of his intention, when he has declared it, or to ſupply the defect of not declaring it, by general rules of deſcent and diſtribution, which take place in failure of a diſpoſition made by himſelf. It is upon theſe principles, that ſeveral methods of conveyance have been eſtabliſhed,

eſtabliſhed, by which the courſe of ſucceſſion may be new-moulded; that ſtatutes have been made, at different times, enabling to alienate, to charge lands with debt, and to deviſe them by teſtament. Hence the court of chancery has gradully extended a ſuperior relief, or equity, to the deviſee, or *hæres factus*, in preference to the heir at law, or *hæres natus*. And it is out of regard to theſe principles and ſtatutes, that he, who diſpoſes, is reſtrained only from doing it in ſuch a manner, as to take away, from all others, that power of alienation, which the law permits to himſelf. In Scotland, the ſame, or ſimilar powers, have been admitted in a tract of time: for, though the conſent of the ſuperior be neceſſary, yet, on adjudication had, the ſuperior may be forced to admit the perſon infeoffed by the vaſſal: and though there be no teſtamentary powers allowed in their law, yet ſettlements *mortis cauſa* are frequent; the general courſe of legal deſcent is interrupted; and the powers over the eſtate limited and modelled, often, indeed, much ſtricter, in reſpect of him who is to take it, than they are in England, yet much more according to the maker's fancy. But how much ſoever the

the intention of the maker of a ſettlement may be favoured in both countries, ſo as that the law has been brought to ſay, in prejudice to itſelf, *Modus et conventio vincunt legem*, ſtill the law governs and reſtrains, in matters, which govern the common policy, nor ſuffers that intention to defeat the ends of it. The intention is favoured, where it may, conſiſtently with thoſe ends; and, in different countries, the regard ſhewn to it will differ, and be either reſtrained or extended, according to the varying reaſonings of various ſyſtems of law, and deciſions of courts of judicature. Yet let the regard ſhewn to it in Scotland be as great as poſſible, (which ſhall now, for argument ſake, be allowed to ſtand upon the beſt foundation), certainly it would be a dangerous conſequence, in reaſon of law, becauſe the intention of the party is ſo far favoured, as that ſettlements in tail may be made much ſtricter in that country, than they are in England, that therefore the forfeiture of eſtates-tail ſhould be proportionably reſtrained: ſince, in proceſs of time, as thoſe ſettlements prevailed, the policy of the law of forfeiture would be entirely evaded, (a caſe which can never happen in England,

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as will be ſhewn hereafter, when the diſtinction ſhall be accurately ſtated between the two kinds of ſettlement). It is plain, in point of fact, that this conſequence was not admitted in the old feudal law, by which, notwithſtanding the ſtrict regard had to the intention of the donor, and in conſequence of it, the tenant's inability to aliene from his heirs, the land was forfeited to the lord in many inſtances. It was plainly not admitted in Scotland at the time of the reſolution in Lord Stormont's caſe; for otherwiſe the lords of ſeſſion would have declared the eſtate-tail exempted from forfeiture, when they declared the tenant reſtrained from alienation by grant or ſale. It was plainly not admitted by the Scots parliament, at the time of making the declaratory act of 1685, in ſupport of eſtates-tail, when this right of the crown was reſerved in the moſt ample manner. It was plainly not thought of in 1688, by the convention of eſtates at the Revolution, who, in declaring the forfeiture a grievance, proceeded upon the unjuſt and extraordinary application of it, in the courſe of the preceding reign, without giving the leaſt intimation, that, of itſelf, it was inconſiſtent with natural juſtice, or the

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reaſon of the common law. If, therefore, it be ſhewn, That the conſequence would be dangerous, in point of reaſon, and, till the year 1690, was not, in fact, admitted by the parliament; we may conclude, till then, that the fact was grounded upon the reaſon; and the legiſlature of Scotland thought, that though the principle of making alienation by crime, and by conſent, run *pari paſſu*, might, in general, be juſt; yet, if it were indulged to its full extent, in their country, it might endanger the ſubverſion of all juſtice.

That the argument may be carried further, let Craig's obſervation be reſumed. That the creation of theſe eſtates-tail was injurious to the ancient courſe of deſcents, and to the rights of wardſhip, and marriage of females, ſo beneficial to the king and lords. Let it be ſuppoſed, when the king originally gave way to the creation of them, that he addreſſed himſelf to the firſt makers of them, in this manner: "Since you think theſe ſettle-"ments will tend to preſerve and perpetuate "the wealth and dignity of your families, "I am ready to conſent, though in conſe-

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" quence it will deprive me of rights, which
" have been eſteemed the faireſt flowers of
" the prerogative. But ſome of theſe, be-
" ing merely private and perſonal advantages
" to myſelf, ſhall not be placed in competi-
" tion with the deſires of my people. One
" right belongs to the crown, that of forfei-
" ture for treaſon, in its nature and effects
" of too much concernment to yourſelves
" and the kingdom, as the great ſanction of
" law, and cement of ſociety, to be ſurren-
" dered by me. Eſtabliſh theſe tailzies as
" ſtrongly as you may: try all the precau-
" tions, which either the wiſdom of the
" common law, or the parliament, will al-
" low, to protect your ſettlements from
" thoſe, who, by the ordinary methods of
" alienating, ſhall endeavour to contravene
" them. But let it be underſtood for ever
" by you, and your heirs, that you may take
" care to cultivate the beſt inclinations, both
" in yourſelves and others, when the funda-
" mental policy of the law itſelf is contra-
" vened by any of you, that public ſettle-
" ment, from which government derives
" peace and good order, every individual the
" ſafe and regular enjoyment of his proper-

" ty, I will reſerve my ſuperior right, agree-
" able to your ancient cuſtoms, and the
" conſtitution of the realm."

It is true, that the Scots nation, and its great deliverer at the Revolution, reaſoned in another manner, not looking forward with enlarged views to future contingent dangers from the abdicated family, but attentive only to that dark ſcene, which had been juſt cloſed with ſuch wonderful circumſtances of felicity in both kingdoms. When the union was completed, a very formidable invaſion was attempted from France, which turned the minds of men upon this ſubject. They ſaw the work of much time, induſtry, and wiſdom, in danger of being utterly deſtroyed, at the very inſtant it was finiſhed; and, as ſoon as the danger was removed, thought it no longer fitting, that Scotland ſhould want that legal ſanction, which is a main pillar of the Engliſh monarchy. They ſaw a neceſſity, whilſt pretenſions to the crown ſubſiſted, (eſpecially when the treaty of union had been formed on principles eſſentially contrary to thoſe pretenſions), that not only the people, but the law, as an expreſſion of the

the ſenſe of the people, ſhould oppoſe the terror of its ſevereſt puniſhments againſt any, who might dare to ſupport them. The wiſeſt among us had long wiſhed, that the ſame ſyſtem of laws, and private rights, as well as the ſame adminiſtration of government, ſhould prevail over this iſland; and knew that the reformation of whatever relates to treaſon, that is, to the public policy of the kingdom, contributed in a great degree to that end. When the crime and proceedings had been made uniform in both countries, the forfeiture came to be conſidered. That of entailed inheritances was attended with difficulties; the caſes ſaved from it, and thoſe which are liable to it, conſiſtently with the principle ſo much inſiſted on, have been already ſtated. Some arguments have likewiſe been offered to mitigate, if not juſtify, the ſeeming rigour of that caſe, which, it is ſaid, can hardly be reconciled with this principle: and perhaps a lawyer and ſtateſman, reaſoning upon it with the prejudices of the law, and conſtitution of England, about him, might purſue his argument ſtill farther. He would recollect in what manner attempts to add irritant and reſolutive clauſes to gifts in tail, have

been treated in Weſtminſter-hall. Even before the ſolemn judgment in Edward the fourth's reign, that a tenant in tail by common recovery might bar not only his own iſſue, but all remainders and reverſions expectant upon his eſtate, the law was held to be againſt them, notwithſtanding the expreſſion in the ſtat. Weſtm. 2. *de Donis*, "that "the will of the donor be obſerved." Two judges, as long ago as in the time of Richard II. and Henry IV. cauſed ſettlements of their land to be made with ſuch clauſes inſerted; but Littleton and Coke, and all the courts, have ſaid, in judgment, that they are not to be allowed, as full of imperfection and danger, and offending againſt many rules and reaſons of the common law. He would then obſerve the difference between the ſtrict entails of the two countries. The ſtricteſt ſettlement which can be made in England, may be overturned, as ſoon as made, by the joint act of thoſe who have the immediate poſſeſſion and ſeiſin, and the heir in tail next deſcribed in it; whoſe eſtate, when it comes at any time into poſſeſſion, enables him to aliene or forfeit the whole by his ſingle act. In Scotland, there is no ſuch power lodged in any

any one or more members of the tailzie, either by the terms of the ſettlement, or the conſtruction of law upon it. So that the entails of that country are, in a word, complete perpetuities. As a lawyer, he would recite, with what applauſe the methods taken both by the parliament and judges, to reſcind or evade the ſtatute *de Donis*, have been received in all times: with what indignation attempts to revive the force of it have been rejected: and he would enumerate the old ſayings, grave ſentences, and wiſe deciſions, againſt perpetuities, with which the copious writers of the law furniſh him. As a ſtateſman, he would reflect on the many inconveniences ariſing from them to the crown, the public, to families themſelves: their repugnancy to the fluctuating genius of property and commerce, to the fundamental maxims of infant or flouriſhing ſtates. And he would draw this concluſion from the whole; That as far as England and Scotland agree in the principle of creating or alienating eſtates of inheritance, ſo far they ſtand upon equal terms as to the forfeiture; but for all beyond, he muſt think it ſomewhat ſtrange, firſt to ground eſtates upon principles contradicting the general po-

licy of law, and then to complain, that they are not favoured in every inſtance to which thoſe principles will lead us.

But, not to inſiſt upon reaſonings, which may ſeem derived from prejudice, this is certain, that the Scots nation in general has been a gainer by the new law. Try it by the rule laid down in the 18th article of union, either as a matter of public government, or private right, (for it is a mixed queſtion of both), it is evidently for the greater utility of the ſubjects within that country. The certainty, the juſtice, the lenity of the law of England, in ſhort, every ſecurity againſt the abuſe of forfeiture, which was known to one half of the people, is extended to the other in its full ſtrength. As therefore that ſyſtem of the law of treaſon, from which confiſcations received all their bitterneſs, was aboliſhed by the act for improving the union; and both then, and ſince, unhappy commotions, dangerous to the liberty of each kingdom, have ariſen in North-Britain, thoſe who in ſome degree reſtored the forfeiture of the eſtates-tail deſcribed in that act, (which had been taken away but a few years), proceeded on the

the very principles which animated thoſe who declared it a grievance. It would be diſhonourable to ſuppoſe, that the ſame wiſdom of that nation, which adopted the revolution, the union, and proteſtant ſucceſſion, would not entirely have approved it, when the general benefits of the alteration were attended to, and the particular neceſſity of ſtrengthening this mighty fabric, formed and cemented of ſuch ineſtimable materials, againſt the incendiaries of faction, and the reſtleſs tools of ſlavery.

But whatever the ſituation of affairs might be in any former time, ſurely it is modeſt to affirm, that every argument which could be uſed for the continuance or vindication of the law in queſtion, ſtrikes with redoubled force in this unexampled criſis of foreign and domeſtic dangers. Every topic, which can be laboured to clear difficulties, and ſooth mens thoughts, appears to generous minds in the moſt amiable light. What one pretender would have unſettled, both when the union and ſucceſſion took place, another, in his father's name, with that boldneſs, which deſpair, and not hope, ſuggeſts, is attempting

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to ſubvert. Have then theſe deſcendants of king James a right to complain, that the puniſhment of an anceſtor is extended to their detriment, who now ſtand excluded for their own fault, in preſumptuouſly and ſeditiouſly affronting the unbiaſſed ſenſe of parliaments for more than half a century, and traiterouſly ſetting up a title to the crown, contrary to the duty of that allegiance, which the pretender owes as an Engliſh ſubject, inconſiſtent with the ſolemn oaths of the people, and repugnant to the legal maxims of a free conſtitution? Shall that family, who have thrown a diſgrace upon the law of forfeiture for treaſon, by the intolerable grievances, which once aroſe from it, through their means, when the cauſes of grievance are removed, both by a change of perſons, and the reformation of laws, gain indemnity to their raſh followers, by the abolition of it?

To ſum up the whole of the argument in a few words: if we conſider this law with a partial view to temporary convenience and neceſſity, it may be ſaid, that as, in the military art, it is held dangerous to vary the order of battle, whilſt the enemy is in ſight; ſo,

ſo, in civil prudence, to take away conſtitutional ſafeguards, when the evil to be prevented advances with large ſteps, and is at hand. If we conſider it with a general view to the everlaſting rules of truth and juſtice, (which differ in name, rather than reality, the one being in ſpeculation what the other is in practice), it ſeems conſonant to all our natural and beſt grounded notions. If we conſider it with a general view to policy and freedom, we find it ſo limited in Great Britain, as that, for the future, neither a weak prince can exert it wantonly, nor a baſe one oppreſſively; at the ſame time that it has all the force, which either a wiſe monarch can make uſe of, or a virtuous can deſire. In a word, it is peculiarly fitted to the Britiſh conſtitution, and to this period of its duration: it is without intricacy, or cruelty: not formed on ſlaviſh or exotic models, but on truth, juſtice, policy, and freedom; thoſe ſacred principles, which inſpire moral conduct; plan, adminiſter, preſerve civil government; and, being united, are the wiſdom, the power, and the majeſty, of all ages.

FINIS.

Ex. Off. R. S.
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